UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, DC

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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 320

January - December 2023

Stephen R. Henley, Chief Judge

Longshore:

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Black Lung:

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I. Longshore and Harbor Workers' Compensation Act

A. U.S. Circuit Courts of Appeals

Barrosse v. Huntington Ingalls, Inc., 70 F.4th 315 (5th Cir. 2023).

The Fifth Circuit held that the maritime worker's state-law tort claims against his employer were not preempted by the LHWCA. First, the claims were not expressly preempted. Second, as a matter of first impression, the court held that conflict preemption did not apply under the limited circumstances involving the maritime worker injured in the "twilight zone" in Louisiana, who neither sought nor obtained LHWCA benefits and whose injuries were not covered by the relevant version of the Louisiana Workers' Compensation Act.

Ronald Barrosse ("Barrosse") was a shipyard electrician who claimed to have contracted mesothelioma from his time working on U.S. Navy ships in 1969 under Huntington Ingalls. Barrosse brought a state-law tort claim but did not file for benefits under the LHWCA. Huntington Ingalls moved for removal under the federal officer removal statute, and once that removal was granted moved for summary judgment, claiming the tort claims were preempted under the LHWCA due to both conflict and express preemption. Barrose passed away mid-litigation, and his survivors substituted themselves as plaintiffs. The district court granted employer's motion, holding that claims were preempted. Survivors appealed.

Background of the "Twilight Zone"

In 1917, the Supreme Court held that States were constitutionally barred from applying their compensation systems to maritime injuries. Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 717, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980) (citing S. Pac. Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917)). In 1927, Congress passed the LHWCA to provide compensation for maritime workers. The original LHWCA expressly limited its application to those cases where state worker's compensation laws did not apply. However, it was unclear where the boundary was between state and federal remedies, so injured workers had to guess whether to file a claim under state or federal law. The Supreme Court responded with the creation of the so-called "twilight zone," an area of concurrent jurisdiction that applies on a case-by-case basis. In 1972, Congress extended the LHWCA landward beyond the shoreline of the navigable waters of the United States. The Supreme Court then reaffirmed the twilight zone because it remained unclear where federal jurisdiction ended and state jurisdiction began. Thus, despite the text of the Act expressly providing that employer liability for injuries falling under its ambit is "exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty," the Supreme Court has limited that exclusivity to cases outside the so-called twilight zone. 33 U.S.C. § 905(a).

Further, in Louisiana, when the survivors of a decedent bring state-law claims based on asbestos exposure, the pertinent law is that which was in effect at the time of the alleged exposure. Because mesothelioma was not in the list of scheduled compensable injuries under the Louisiana Workers' Compensation Act in 1969, the only state-law remedy available to Barrose is a tort claim.

Express Preemption

Here, Barrose's injury occurred in the twilight zone. Under the Supreme Court precedent discussed above, which included strong dissent, express preemption did not bar his claim. This precedent is binding unless the Supreme Court reconsiders it.

Conflict Preemption

The Supreme Court has recognized that LHWCA remedies exist concurrently with state-law remedies, including at least some state-law tort claims, in the twilight zone. See Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272, 273 (1959).

In this case, the Fifth Circuit found that conflict preemption did not apply to bar Barrosse's state law claim, as is consistent with the Supreme Court jurisprudence and the intent of Congress. The court reasoned that to hold contrary would effectively eliminate state law in favor of the LHWCA remedies and contradict the Supreme Court's twilight zone doctrine.

The court distinguished this case from several potentially relevant holdings in which the LHWCA was deemed to have preempted state workers' compensation acts by denoting that the main purpose of conflict preemption in twilight zone cases is to prevent an employee from claiming benefits under both the LHWCA and state tort laws. Since Barrosse only filed under state-tort law, there is no issue of an employee trying to take advantage of the system and gain additional benefits after already receiving them through a LHWCA claim. In other words, the cases in the twilight zone that are conflict preempted are those in which an employee attempts to "double dip" benefits from both statutes.

In assessing the validity of the policy outcome of siding with Barrosse in this case, the court looked to whether or not the state court claims unacceptably obstruct the balance that the LHWCA strikes between employer and employee. While siding with Barrosse upset that balance slightly, it did not reach to level of an "unacceptable obstacle" to the purpose of the LHWCA, especially considering the rarity of a case like this.

The court reasoned that the only distinction between Barrosse's claim and the one in Hahn is that the state statute explicitly gave the employee a claim, whereas Louisiana in the current case gave an employee an implicit tort claim by failing to include mesothelioma from their list of scheduled injuries. To exclude the state tort claim would be to supplant state law with the LHWCA, which would run against Supreme Court instructions that the LHWCA only acts to supplement it.

The court stressed that its holing applies to a limited category of claims and only concerned:

1) maritime workers; 2) injured in the twilight zone; 3) in Louisiana; 4) who neither seek nor obtain LHWCA compensation; and 5) whose injuries are not covered by the relevant version of the WCA.

[Section 5(a)]

Huntington Ingalls, Inc. v. Director, OWCP, ___ F.4th ___ (5th Cir. 2023).

The Fifth Circuit upheld the Board's inclusion of audiologists within the definition of "physicians" for purposes of Section 7(b) of the LHWCA. First, the court held that under the plain meaning of the relevant regulation, 20 C.F.R. § 702.404, audiologists are physicians, so the Agency's interpretation of its own regulation is not due any deference. Second, even if the regulation is ambiguous, the Agency's interpretation of that regulation should receive only Skidmore deference—not Auer deference. See Skidmore v. Swift & Co., 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944); Auerlui v. Robbins, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). Under either holding, the Board was correct to order that claimant had a right to select his own audiologist.

From 2003 to 2009, claimant worked as a sheet metal mechanic for employer. After leaving the company, claimant complained of hearing loss. He selected an audiologist and underwent an audiogram. Audiologists are health care professionals who identify, assess, and manage disorders of hearing, balance, and other neural systems. Claimant's selected audiologist administered a hearing test that generated an audiogram, a chart that shows how well one hears sounds in terms of frequency and intensity. The audiogram indicated a 17.2% binaural hearing impairment under the American Medical Association's Guide to the Evaluation of Permanent Impairment. Claimant presented the audiogram to employer's claims adjuster.

Employer requested that claimant submit to an audiogram done by an audiologist of its choosing, who reported that claimant's level of hearing impairment was 0% (albeit with "mild high frequency sensorineural hearing loss"). Employer stated it would accept liability for medical benefits, but only based on the audiogram completed by its own audiologist. It also required a hearing aid fitting be conducted by employer's audiologist. Claimant then filed a claim for compensation and medical benefits under the LHWCA.

The ALJ denied the claim, holding that claimant did not prove causation by a preponderance of the evidence. Claimant appealed the ALJ's decision to the Benefits Review Board.

Initially, the Board unanimously affirmed as to the denial of compensation benefits. But the Board reversed and remanded to the District Director regarding medical benefits, based on employer's earlier stipulation to pay for claimant's hearing aids. The Board held that although claimant was eligible for that medical benefit, he did not have a statutory or regulatory right to choose his own audiologist. Claimant moved for reconsideration. However, in a subsequent decision, by a two-to-one vote, the Board reversed its initial decision on whether claimant could choose his own audiologist. See Jones v. Huntington Ingalls, Inc., 55 BRBS 1 (2021) (Boggs, C.J., dissenting), rev'g 51 BRBS 29 (2017). The Board held instead that an audiologist is a "physician" such that claimant is permitted his initial choice of audiologist pursuant to Section 7(b) as a matter of statutory construction. Employer appealed.

Section 7(b) provides that a claimant shall have the right to choose an attending "physician." The sole question presented was whether an audiologist is a "physician" for purposes of Section 7(b). The Fifth Circuit initially concluded that, under traditional statutory interpretation methods, the text, structure, history, and purpose of the Act all lead to inconclusive answers. The court's analysis pulled it equally in both directions. In particular, the court noted that the primary definition of a physician provided in the Webster's Third New International Dictionary 1707 (1966) is: "a person skilled in the art of healing : one duly authorized to treat disease : a doctor of medicine — often distinguished from surgeon." This definition is ambiguous as it encompasses both a broad and narrow meanings. Based on the education they receive and the role that they play in identifying and treating hearing disorders, audiologists can fairly be described as "skilled in the art of healing." And the technical, post-graduate education they receive makes them "duly authorized to treat disease" related to hearing. However, audiologists are not themselves medical doctors.

The court concluded that Section 7(b) is genuinely ambiguous. It then turned to whether the Agency's interpretation of "physician" is entitled to deference and to what extent.

Application of Chevron

Under Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), when an ambiguous statute is accompanied by implementing regulations, the court does not simply impose its own construction on the statute. Rather, it looks to the agency's regulation and defers to that interpretation, but only if the agency's answer is based on a permissible construction of statute.

In 1977, the Agency interpreted the term "physician" to "include[ ] doctors of medicine (MD), surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 20 C.F.R. § 702.404. The Agency defines the term not only by positively including examples of practitioners but also by excluding others: "Naturopaths, faith healers, and other practitioners of the healing arts which are not listed herein are not included within the term 'physician' as used in this part." Id. And in 1985, after Section 8 of the statute was amended to add the portion on hearing loss, the Agency promulgated a regulation on claims for loss of hearing that included references to audiologists and otolaryngologists. 20 C.F.R. § 702.441.

The court concluded that the Agency's interpretation is reasonable and does not conflict with the language of the statute. The regulation includes many learned health care professionals, even though they are not all medical doctors. But the regulation draws the

line to prevent the term "physician" from sweeping in untrained or uncertified individuals who purport to exert a healing influence. This is consistent with the court's analysis of the statutory language, above.

Because the regulations are permissible under Chevron, the next question is whether they resolve the statutory ambiguity. First, the court rejected employer's assertion that the list of practitioners who qualify as physicians in 20 C.F.R. § 702.404 is exclusive. It is appropriate as a matter of ordinary language to infer that the catchall phrase at the end of the list does not actually catch all other professions; it includes only other similar professions. Second, audiologists are more akin to the explicitly included practitioners of the healing arts than the explicitly excluded practitioners. Unlike naturopaths and natural healers, audiologists are licensed by the state where they practice, and they engage in conventional medical treatment. They are analogous in many ways to optometrists, who are included as "physicians" in the regulatory definition. Specifically, despite lacking a medical degree, audiologists are able to administer hearing tests, evaluate the resulting audiograms, and then use that information to fit a patient with hearing aids.

Thus, the court held that the plain meaning of the regulation includes audiologists, and because that regulation is entitled to Chevron deference, audiologists are included in Section 7(b)'s use of the word "physician."

Alternatives, determining application of Skidmore versus Auer

In the alternative, the court analyzed the issue presented by assuming arguendo that the regulations are ambiguous. There are two levels of deference that a court may provide to an agency's interpretation of its own ambiguous regulation: Skidmore deference and Auer deference. When it applies, Auer deference gives an agency significant leeway to say what its own rules mean. A court should only use this stronger form of deference when an agency's interpretation: (1) is authoritative; (2) is based on its expertise; and (3) reflects the agency's "fair and considered judgment." If an agency interpretation does not meet these factors, then, under Skidmore, it is owed deference only so far as it is persuasive.

In this case, the court held that, even though the Agency's interpretation was within an area of their expertise and reflected a "fair and considered judgement," it was not authoritative and therefore not entitled to the strong deference that Auer provides (collecting cases). Here, two materials could potentially indicate "authoritative" interpretation by the Agency – the letter from the Occupational Health and Safety Administration ("OSHA") and the Longshore Procedure Manual; however, neither one did in this case. The OSHA letter did not have authoritative force for LHWCA claims, because OSHA is a separate department with no relation to the instant case and the letter addressed an unrelated regulation. The Longshore Procedure Manual, an official document, could provide some evidence of the Agency's authoritative views. It instructs that audiograms are presumptive evidence of the amount of hearing loss sustained if they are administered by a certified audiologist, physician, or a qualified technician under their supervision. However, in this case, the Manual was not a source of authority because its guidance is a mere repetition of the language of the statute. Because there was no real interpretation within the Manual, there was no interpretation to which authoritative force could attach.

Thus, the court held, in the alternative, that if the Director's position is to be granted any deference, it should receive only Skidmore deference. The Fifth Circuit follows the rule that alternative holdings are binding precedent and not obiter dictum. Because the court was

persuaded by the text of the regulation itself that audiologists meet the definition of "physician," applying Skidmore deference to the Director's same conclusion lead to an identical result.

[Section 7(b)—Choice of Physician and Physician Defined; Section 21—Appellate Procedure -- Review by U.S. Courts of Appeals – Deference]

Smith v. Crounse Corp., 72 F.4th 799 (7th Cir. 2023).

Steven R. Smith sued Crounse Corporation for injuries he sustained while unloading coal from a barge owned by Crounse, alleging violations of Section 5(b) of the LHWCA, general maritime law, and Indiana law. The District Court granted summary judgment in favor of Crounse. The Seventh Circuit affirmed on appeal, holding that the barge owner did not breach its turnover duty in violation of Section 5(b) of the LHWCA, and that exclusion of Smith's lay testimony was not abuse of discretion.

Smith worked as a Bobcat skid steer operator for Mulzer Crushed Stone. Crounse had a contract with Mulzer to provide barges for transporting its crushed stone product. Crounse's barges were also used by other companies, including to haul coal. In the agreement between Mulzer and Crounse, Mulzer and Crounse agreed that Mulzer would clear any remaining coal from the barges and sell it for its own profit, relieving Crounse of the duty of cleaning the barges before delivering them to Mulzer.

On April 24, 2017, Smith was tasked with clearing out the last foot of coal from a Crounse barge using a skid steer with a blade attached. While operating the skid steer, the blade ran into an obstruction on the steel floor of the hopper, causing the skid steer to stop abruptly. Smith's seatbelt failed, and he was injured when he hit a safety bar on the skid steer. The obstruction on the hopper floor was later identified as a "scab," which is a raised portion of hopper flooring caused by split seams in the barge's steel floor. Smith filed suit against Crounse, alleging violations of Section 5(b) of the LHWCA, general maritime law, and Indiana law. Smith claimed that the scab was old damage, with rust and marks indicating prior repairs, and therefore Crounse should have known about the defect and warned him.

The Seventh Circuit Court affirmed the District Court's finding that Smith did not provide sufficient evidence to show that Crounse had actual or constructive knowledge of the defect.

The Court's decision was based on the vessel owner's "turnover duty" under Scindia and Howlett. Under these two cases, the vessel owner has a duty to exercise ordinary care under the circumstances to turn over the ship and its equipment in such condition that a competent stevedore will be able to perform cargo operations with reasonable safety. The vessel owner is only required to warn the stevedore of any hidden hazards on the ship or its equipment that are known or should have been known in the exercise of reasonable care.

In this case, Smith failed to meet his burden of evidence in demonstrating that Crounse had actual or constructive knowledge of the scab defect. The Court found that Smith's lay opinion regarding the age and prior repair of the scab was not admissible as evidence and that Smith's speculation about how long the defect had existed was not supported by the record.

Crounse presented evidence that it had regular inspection and repair procedures for its barges, and no Crounse employee or third party had reported the scab defect before the accident. The Court noted that just because the scab existed did not mean that Crounse did

not conduct reasonably diligent inspections. The barge had been used without incident for several months after Smith's accident, and the defect was professionally repaired afterward. There was no evidence of any prior injuries caused by scabs. Additionally, the record showed that Smith's testimony indicating that other Mulzer employees had encountered scabs meant that "the problem was one likely to be encountered by a stevedore in the course of cargo operations, and anticipated by him if reasonably competent in the performance of his work."

Based on the evidence provided, the Court concluded that Smith produced insufficient evidence to demonstrate that Crounse had actual knowledge, or in the exercise of reasonable care constructive knowledge, of the scab defect in the hopper floor. The existence of the scab defect, which the record indicated could happen randomly and not necessarily due to negligence, was not sufficient to show negligence in Crounse's inspections. Therefore, the Court affirmed the District Court's judgment in favor of Crounse.

[Section 5(b)]

Johnson v. Cooper T. Smith Stevedoring Co., Inc., 74 F.4th 268 (5th Cir. July 2023).

Plaintiff Lester Johnson appealed the District Court's grant of summary judgment in favor of defendant Cooper T. Smith Stevedoring Company on his claims of Jones Act negligence, failure to pay maintenance and cure, unseaworthiness, and vessel negligence.

Johnson worked as a longshoreman for Cooper and was injured after falling onto the deck of the AMERICA from an adjacent barge. After using a front-end loader to load cargo onto the AMERICA, Johnson fell through a ladder exit 13 feet onto the deck of the AMERICA. As a result, Johnson suffered numerous injuries and was hospitalized. The district court concluded that Johnson did not present evidence to establish his seaman status or vessel negligence, leading to the grant of summary judgment in favor of Cooper. Johnson collected workers compensation benefits under the LHWCA for these injuries. Subsequently, Johnson filed a Jones act claim of negligence, failure to pay maintenance and cure, and unseaworthiness, and in the alternative negligence under the LHWCA and general maritime law.

The Fifth Circuit affirmed the District Court's decision. Johnson's claim of seaman status under the Jones Act requires a substantial connection to the vessel in terms of both duration and nature. While Johnson met the first part of the test by contributing to the function of the AMERICA, he failed to demonstrate a substantial connection in terms of duration. His 20-year work history with Cooper was not sufficient to show such a connection to the AMERICA itself, stating that "we simply do not know and cannot infer based on this record how often he reported to or worked on, around, in service of, or in connection with the AMERICA; there is a gap in the summary-judgment evidence that dooms his claim to seaman status." Johnson's injury occurred while performing a discrete task that is not indicative of a longstanding relationship with the AMERICA. Therefore, the Court concluded that Johnson is not considered a seaman under the Jones Act.

The Court further found that Johnson failed to present any evidence showing vessel negligence for his claim under 33 U.S.C. § 905(b). He did not cite specific materials in the record to establish a genuine dispute of material fact regarding the vessel's negligence. As

a result, the District Court's grant of summary judgment to Cooper on this claim was also upheld.

[Exclusions from Coverage - Section 2(3) (G) - a master or member of a crew of any vessel]

B. Benefits Review Board

Fraker v. Triple Canopy, ___ BRBS ___ (Dec. 2022).[1]

Agreeing with the OWCP Director, the Board held that the ALJ erred in remanding the case to the District Director pursuant to 20 C.F.R. § 702.351, because employer's withdrawal of controversion did not cover "all issues" scheduled for a hearing; the remaining issue was claimant's continued entitlement to benefits that employer has been voluntarily paying.

While working for employer in Afghanistan, claimant fell off a treadmill resulting in alleged injuries to his lumbar spine, right knee, right hip, right groin, and cervical spine. Two days later, claimant allegedly injured his left shoulder after falling in the shower when his right knee gave out. Claimant subsequently amended his claim to include his left shoulder injury.

Employer initiated temporary total disability ("TTD") benefits. A dispute arose regarding the authorization of medical treatment. Following an informal conference, a claims examiner recommended employer authorize claimant to have knee and shoulder surgeries. Employer thereafter agreed to authorize claimant's knee surgery but refused to authorize his shoulder surgery.

Claimant subsequently submitted a Form LS-18, Pre-Hearing Statement, requesting the claim be referred to the OALJ. Notably, in addition to authorization for shoulder surgery, he also listed his ongoing entitlement to disability compensation as a disputed issue. Employer sought remand to the district director, stating it would withdraw its controversion as to the shoulder surgery. But while it agreed to have the district director issue a compensation order on that issue, it objected to any order awarding TTD compensation because it was paying those benefits and had not controverted claimant's right to that compensation.

The ALJ granted employer's request for remand. She relied on 20 C.F.R. § 702.351, which provides that "whenever a party withdraws his controversion of the issues set for a formal hearing, the administrative law judge shall halt the proceedings . . . and forthwith notify the district director who shall then proceed to dispose of the case as provided for in § 702.315." Because employer was paying TTD compensation voluntarily, she found that issue was not contested and therefore not ripe for adjudication. Claimant appealed. The Director responded, asserting that the ALJ erred in not issuing an order resolving claimant's right to continuing TTD compensation.

The Board held that the ALJ erred in granting remand under 20 C.F.R. § 702.351, as the language of that regulation unequivocally requires agreement between the parties on all issues prior to remand. Because employer and claimant disagree regarding claimant's continued entitlement to compensation, remand was prohibited. Section 702.351 instructs

[1] In February 2023, the Board granted a motion to publish its decision in Fraker v. Triple Canopy, BRB No. 21-0511 (Dec. 22, 2022).

ALJs to halt proceedings and remand claims to the district director upon receipt of a signed statement withdrawing controversion of all issues scheduled for a hearing. Here, employer submitted a signed statement withdrawing its controversion of one limited issue: whether to authorize claimant's request for shoulder surgery. The scheduled hearing before the ALJ, however, was not limited to that issue but was also to address the issue of claimant's entitlement to continuing TTD benefits, as raised in his Pre-Hearing Statement. As employer's withdrawal of controversion did not cover "all issues" scheduled for a hearing, remand was improper. Sections 702.315 and 702.316 further supports this conclusion, as District Director is authorized to enter a compensation order only when agreement is reached on all issues. In Hoodye v. Empire/United Stevedores, 23 BRBS 341 (1990), the Board has explicitly held Section 702.351 can only apply when no unresolved issues remain. Employer attempted to distinguish Hoodye, arguing the suspension of benefits there created a real dispute absent in this case. The Board concluded this alleged distinction made no difference. In both cases, the remaining issue was claimant's continued entitlement to benefits that employers were voluntarily paying.

The Board further noted that the ALJ erred in her application of the ripeness doctrine to this claim. The parties clearly did not agree remand was in order, which in and of itself precluded remand under 20 C.F.R. § 702.351; therefore, the Board addressed ripeness only for clarity. Employer's voluntary compensation payments under the Act do not constitute a stipulation as to compensability; therefore, absent an order, employer can unilaterally, and at any time, dispute the compensability of an injury, suspend, or terminate benefits, and/or withhold medical authorization, a potentially significant hardship on claimant. The fact that claimant has not yet reached MMI is immaterial, and employer has provided no other reason why the requested relief should be postponed. Because the interest in postponing relief was outweighed by the potential hardship on claimant, his continued entitlement to disability benefits was an issue ripe for adjudication.

Accordingly, the Board reversed the ALJ's orders granting employer's motion for remand and denying claimant's motion for reconsideration. It instructed the ALJ, on remand, to address claimant's continued entitlement to disability benefits under the Act, either after adjudication or upon the parties' stipulation.

[Administrative Law Judge Adjudication -- Authority of the Administrative Law Judge in General -- Duty to Award or Deny Benefits; Ripeness]

Lui v. American Univ. of Afghanistan, __ BRBS __ (June 30, 2020), recon. en banc denied Nov. 13, 2020.[2]

Agreeing with the OWCP Director, the Board held that claimant was covered under Section 1(a)(5) of the Defense Base Act ("DBA"), because the United States Agency for International Development ("USAID") implicitly "approved" claimant's employment contract with employer based on the terms of its cooperative agreement with employer. USAID's oversight and approval of employer's budget, including its international staff salaries, constituted "approval" by the United States of claimant's employment contract.

[2] In February 2023, the Board granted a motion to publish its decision in Lui v. American Univ. of Afghanistan, BRB No. 19-0315 (June 30, 2020), recon. en banc denied Nov. 13, 2020.

Employer, the American University of Afghanistan ("University"), was founded in 2006 to provide higher education for Afghans and others in the region. It entered into a cooperative agreement with the USAID whereby USAID agreed to pay employer 40 million dollars from 2013 to 2018. This funding represented approximately 36 percent of employer's total budget. One of the purposes of the cooperative agreement was to fund the hiring of employer's faculty and staff. In 2013, employer entered into an employment contract with claimant to serve as an Associate Professor of Finance. In 2016, claimant was lecturing in a classroom when an insurgent group attacked the campus, killing and wounding a number of people. Claimant was hit by shrapnel, injured his left wrist and elbow jumping from a second-floor window, and claimed he suffered psychological injuries. He filed a claim under the DBA; employer controverted, asserting the DBA was inapplicable.

The ALJ found the claim did not fall within Section 1(a)(4) of the DBA, because, inter alia, the cooperative agreement between employer and USAID was not a "contract" as that term is used under the DBA. The ALJ also determined the claim did not fall under Section 1(a)(5), because the United States or an agency thereof did not approve claimant's employment contract. Claimant appealed, challenging both findings. The OWCP Director responded, asserting the ALJ properly denied coverage under Section 1(a)(4), but urging the Board to reverse the denial of coverage under Section 1(a)(5).

Section 1(a)(4)

The Board affirmed the denial of coverage under Section 1(a)(4). As a condition of coverage, Section 1(a)(4) expressly requires the employee be engaged in employment "under a contract entered into with the United States . . . or agency thereof." The ALJ properly found, pursuant to University of Rochester v. Hartman, 618 F.2d 170 (2d Cir. 1980), that the cooperative agreement between employer and USAID is not a "contract" under the DBA, thereby precluding coverage under Section 1(a)(4). In University of Rochester, the court relied on the Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. § 6301 et seq. (formerly codified at 41 U.S.C. § 501 et seq.), which differentiates procurement contracts, grants, and cooperative agreements.

Section 1(a)(5)

To be covered under Section 1(a)(5), claimant's employment contract had to be "approved and financed by the United States . . . or agency thereof." The ALJ concluded that the "financed by" prong was met. The ALJ found, however, that the contract was not "approved" by USAID, because he interpreted this term as requiring actual government approval of claimant's specific hiring contract. The ALJ found the evidence did not establish that the United States approved employer's decisions to hire and retain claimant. He further determined USAID did not explicitly approve claimant's employment contract in the cooperative agreement because that document required USAID approval only of the hiring for key positions. Agreeing with the OWCP Director, the Board concluded that the ALJ construed the statute too narrowly. Section 1(a)(5) does not specify how a contract must be "approved." However, the Board's prior decision in Delgado v. Air Serv. Int'l, Inc., 47 BRBS 39 (2013), does not suggest the government must explicitly approve the employment contract. Rather, Delgado provides there may be evidence showing the agency implicitly "approved" an individual employment contract by virtue of the terms of its agreement with the claimant's employer. In this case, the evidence confirmed that, for purposes of Section 1(a)(5), USAID "approved" claimant's contract.

The general purposes of the cooperative agreement were to: (1) strengthen academic and professional development programs; (2) enhance the quality of programs; (3) expand programs for women; and (4) increase financial self-sufficiency. With regard to "enhancing quality," the agreement stated the University "will continue seeking talented faculty who will strengthen existing and new academic programs," and ensure "appropriately credentialed faculty" are teaching undergraduate courses. The goal was to have 40 percent of the University's faculty holding doctoral degrees. Claimant was hired as an Associate Professor of Finance in the Department of Business and Economics. The preface to his employment contract stated the mission of the University was to "provide advanced academic program at international standards of quality" and, to advance that mission, the University sought "to hire highly qualified international faculty." Claimant is a citizen of Canada and Hong Kong, and received a Ph.D. from the Department of Economics and Finance from the City University of Hong Kong. Under Delgado, this evidence established that, through its agreement with employer, USAID "approved" claimant's employment contract. The Board noted that requiring employer to obtain an extra layer of approval from USAID to replace its top administrators did not diminish this fact. Nor did it undermine the fact that USAID could have used a variety of control mechanisms to disapprove of claimant's hiring, such as cutting off funding for his position or even terminating his employment.

Other evidence further compelled this conclusion. The cooperative agreement required USAID to oversee employer's operations not only by giving financial support, but also by reviewing and approving the plans and budgets, approving any changes of key personnel, and providing for audits by the USAID Inspector General and the Special Inspector General for Afghanistan Reconstruction. The cooperative agreement thus indisputably provided USAID significant approval authority over employer's operations.

As a matter of law, the cooperative agreement easily met the "approved by" standard through USAID's administration of it. The ALJ's narrow interpretation of "approved by" and his limitation of DBA coverage to those "key" employees specifically enumerated in the cooperative agreement as subject to USAID's approval would exclude from coverage all lower level employees carrying out the government-financed mission.

The indisputable evidence demonstrated USAID had approval authority over many aspects of the business relationship with employer, including staff salaries, despite its not having approved claimant's specific employment contract. Claimant's employment contract fell within the broad spectrum of overseeing and approving employer's budget and its international staff's salaries. USAID's oversight and approval of employer's budget, including its international staff salaries, constituted "approval" by the United States of claimant's employment contract under Section 1(a)(5).

The case was remanded for the ALJ to address the remaining contested issues.

Administrative Appeals Judge Boggs concurred in part and dissented in part. She dissented from the majority's decision to reverse outright the ALJ's conclusion that claimant's injury is not covered by the DBA under Section 1(a)(5). Because the Board is not permitted to engage in fact-finding, she would have vacated the ALJ's denial of coverage and remanded the case for him to address whether the evidence of record established claimant's injury was covered by Section 1(a)(5).

[Defense Base Act - Coverage (Sections 1(a)(4) and 1(a)(5))]

Bussanich v. Marine Terminals Corp., ___ BRBS ___ (2023).

Agreeing with the OWCP Director, the Board held that the statute of limitations for seeking modification under Section 22 did not begin to run until all appeals were exhausted with respect to the rejected portion of a claim.

Claimant sustained a work-related injury. Employer voluntarily paid some disability compensation benefits, but later controvert the claim. The first ALJ issued a Decision and Order ("D&O") awarding claimant medical benefits and additional disability compensation benefits until October 17, 2014. Claimant received employer's last payment of benefits by check on June 16, 2017. Claimant appealed the D&O, challenging the finding that his injury had resolved. The BRB affirmed the decision; and the Ninth Circuit affirmed the BRB's decision on December 10, 2019. On December 3, 2020, claimant filed a motion for modification of the D&O pursuant to Section 22 of the Act. Employer moved for summary decision, arguing claimant's modification request was untimely under Section 22. A different ALJ granted employer's motion for summary decision. Relying on the definition of "claim" in Pool Co. v. Cooper, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001), and applying it to the language of Section 22, the ALJ concluded there are only a binary of possibilities: either payments were made or a claim was denied. Because the D&O did not reject claimant's claim in its entirety and awarded some compensation, the ALJ computed the statute of limitations from the date of the last payment of benefits.

Claimant appealed. The OWCP Director agreed with claimant, asserting that, for purposes of Section 22, a partial rejection of a claim implicates the rejection branch of the statute, and the ALJ should have followed the Board's holding in Cobb v. Shirmer Stevedoring Co., 2 BRBS 132 (1975), aff'd mem., 577 F.2d 750 (9th Cir. 1978) (table), because it presented the same factual scenario. Employer urged affirmance, arguing Section 22 must be read in conjunction with Section 19, which gives an ALJ only two options after a formal hearing: reject the claim or award benefits.

The Board agreed with claimant and the Director, holding that claimant's request for modification was timely. Section 22 states a party may seek modification of a previously entered compensation order "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim…." 33 U.S.C. § 922. Here, the D&O granted part of the claim, so there was a payment, and denied part of the claim, so there was a rejection subject to appeal. Because claimant's appeal was still pending after the date of the last payment of compensation, the time for filing modification runs from the date of the final decision on the appeal rather than from the date of last payment.

In Cobb, the Board held that, for purposes of Section 22, a partially rejected claim is a rejection, and the rejection is not final until all appeals are exhausted. The ALJ overlooked this holding. The ALJ erred in applying Pool Co. to these facts, as it involved the separate question of whether a claimant was required to comply with formal regulatory procedures for withdrawing part, but not all, of a "claim." Pool Co. neither addresses Section 22 nor precludes Cobb's holding. Additionally, Section 22 favors accuracy over finality and is meant to render justice under the Act. The ALJ's narrow interpretation of "rejection" defeats the statute's purpose because it would require a claimant to file a motion for modification while his appeal was still pending – before the appellate courts have an opportunity to rectify any error or finalize the adverse decision. Lastly, the Board also

rejected employer's assertion that Section 22's reference to Section 19 somehow supports an interpretation of the term "rejection" as only a complete rejection of a claim.

Here, claimant's request for modification was timely, as it was filed within one year after the Ninth Circuit's decision became final. Accordingly, the Board rejected the ALJ's contrary finding and remanded the case for the ALJ to consider the merits of claimant's modification request.

[Section 22 – Timely Request for Modification]

Siver v. Kaiser Steel Resources, Inc., __ BRBS __ (2023).[3]

Decision and Order affirming grant of summary decision regarding Section 33(g) issue.

David Siver was allegedly exposed to asbestos in the course of his work for Employer. He passed away in 2007 and in 2008 his heirs, consisting of his widow, Ruth Siver, and sons, Marvin and Alton Siver, filed a survival and wrongful death lawsuit. All Sivers were represented by Brayton Purcell ("BP"). In May 2009, Ruth, through BP, signed two disclaimers purportedly renouncing her interest in the third-party actions. Previously, in 2007, Ruth had granted Marvin power of attorney. The May 2009 disclaimers neither mentioned, modified, nor revoked the durable power of attorney. The May 2009 disclaimers were never filed with any court or provided in a timely fashion to any relevant party. In October 2009, Ruth filed a claim for death benefits under the Longshore Act. Between 2010 and 2011, Marvin Siver executed seven third-party settlement agreements in the survivor/wrongful death lawsuits on behalf of David's heirs. There is no evidence Marvin notified any longshore employer or the Director of the settlements. Ruth died in 2015 and in 2019 Marvin was substituted as claimant on behalf of Ruth's estate.

Employer sought summary decision pursuant to Section 33(g). The Longshore Act is the exclusive form of liability against a covered employer. However, under Section 33(a), a claimant may proceed in tort against a third party if she determines the third party may be liable for damages related to the work-related injuries. To protect an employer's right to offset any third-party recovery against its liability for compensation under the Act, a claimant, under certain circumstances, must either give the employer notice of a settlement with a third party or a judgment in her favor, or she must obtain the employer's and carrier's prior written approval of the third-party settlement. Section 33(g) provides that failure to provide proper notice or obtain proper approval terminates a claimant's entitlement to benefits under the Act.

The ALJ granted employer's motion for summary decision based on the affirmative defense of Section 33(g), finding that Section 33(g) barred the claimant from recovering benefits under the Act. As summarized by the Board, the ALJ found: (1) it is undisputed that Ruth was a "person entitled to compensation" ("PETC") within the meaning of the Act and subject to the provisions of Section 33(g); (2) although Ruth did not personally sign the settlement agreements or receive any of the settlement proceeds, her claims were included within the meaning of the third-party settlements such that she was bound by them as a "Releasor" under the clear meaning of the settlement language; (3) Ruth also explicitly granted Marvin

[3] In March 2023, the Board granted a motion to publish this decision originally issued as unpublished on November 7, 2022.

the authority to act as her agent and did not revoke or modify that power through her execution of the May 31, 2009, disclaimers; (4) Ruth, therefore, "entered into" the third - party settlements; (5) employer, its carriers, and/or the Director were never notified and/or never approved the third-party agreements; and (6) the aggregate amount of the settlement agreements is less than Ruth's potential entitlement to benefits under the Act.

The Board reviewed the legal standard of Section 33(g), as well as relevant California law (contract law, wrongful death and survival causes of action, and probate law). The Board then affirmed the ALJ's decision.

The Board found that the ALJ's decision complied "with both the majority and dissenting opinions" in Hale v. BAE Sys. San Francisco Ship Repair, 801 F. App'x 600 (9th Cir. 2020). The Board found that here, there was "indisputable confirmation" of an agency relationship (namely the power of attorney given by Ruth to Marvin). Further, the plain language of the third-party claims and the settlements identified Ruth as a plaintiff and heir, Marvin indicated he had authority to sign on behalf of the settling heirs (who were all represented by BP), and "[b]y virtue of the language of the releases, and the express terms of the power of attorney -- an element missing in Hale -- Ruth both 'entered into' the settlements under the majority's discussion of an agency relationship and was 'bound by' them under the law of contracts." Slip op. at 18.

The Board also stated that Judge Gould's dissent in Hale "overwhelmingly supports the ALJ's decision," and that the settlement language in Siver compels the same result as that favored by Judge Gould. In footnote 18 the Board stated that "in our view only Judge Gould's opinion fulfills the purpose of Section 33(g)," and that the Hale majority's creation of a distinction between "entering into" and "being bound by" a settlement "unnecessarily blur[s] what should be straight-forward matters of contract law" and "potentially writes Section 33(g) out of the statute." Ultimately, the Board held that "[b]ased on the plain language of the settlements, the failure to file or publicize the disclaimers, and California contract and probate law, the ALJ correctly found Ruth is included in the class of plaintiffs who 'entered into' settlements of claims." Slip op. at 19. Because there was no dispute that the aggregate amount of the settlements was for an amount less than that which Ruth would have been entitled to under the Act, and there was no effort to notify or obtain employer's prior written approval, the Board affirmed the conclusion that Section 33(g) barred the death benefits claim.

[Section 33(g)]

Sylejmani v. Fluor Conops., Ltd., __ BRBS __ (2023).

Rejecting the OWCP Director's position, the Board held that the ALJ did not err in considering claimant's testimony obtained in violation of Kosovo's alleged blocking statute. The Board concluded that claimant, who was then represented by counsel, waived any objections to the admissibility of his testimony by failing to object while this case was before the ALJ. Further, claimant and the Director failed to establish the consideration of claimant's already-provided testimony would violate Kosovar law, much less attempted to show that Kosovo's sovereign interest in enforcing that law would outweigh the need to consider his testimony in his DBA claim. Lastly, the Board reversed the ALJ's finding that claimant did not invoke the § 20(a) presumption, but affirmed the ALJ's alternative finding

that claimant did not establish a compensable psychological injury based on the record as a whole.

Claimant, a citizen of Kosovo, worked for employer as a logistics coordinator in Afghanistan in 2010-2011. He was terminated when he tested positive for hepatitis C. In July 2019, clinical psychologist Dr. Maxhuni diagnosed claimant with Post-Traumatic Stress Disorder ("PTSD") and opined he was unable to work. Claimant filed a claim for benefits in August 2019, claiming disability due to a psychological injury arising out of his employment in Afghanistan. Claimant's deposition took place in Kosovo, and he also testified at the formal hearing from Kosovo. Claimant was then represented by counsel, who raised no objections to the legality of his testimony.

After the hearing, the ALJ rendered a lengthy bench decision, which he subsequently incorporated into his decision and order denying benefits. The ALJ found claimant's lack of credibility prevented him from invoking the § 20(a) presumption of compensability with respect to his alleged PTSD. Specifically, the ALJ found claimant inconsistent and vague with respect to his description of exposure to rocket attacks and other incidents while in Afghanistan; his testimony as to the onset, frequency, and nature of his psychological symptoms; and his explanation as to why he failed to seek psychological treatment until 2019. In addition, the ALJ found claimant's testimony undermined and unsupported by evidence in the record. Alternatively, the ALJ assumed claimant invoked the § 20(a) presumption and found Dr. Ogden's medical opinion, that claimant did not suffer from employment-related PTSD, sufficient to rebut it. He thus weighed the medical evidence as a whole to determine whether claimant established a compensable work-related injury. The ALJ found Dr. Ogden's opinion more credible than those of claimant's treating providers, Dr. Maxhuni and neuropsychiatrist Dr. Zubaku. Consequently, he denied the claim.

Claimant, without representation, appealed the ALJ's decision, arguing his deposition was taken illegally, and the ALJ improperly applied the § 20(a) presumption. Employer responded, urging affirmance. The Director also responded, agreeing with claimant as to the potential illegality of his testimony and urging remand.

The Legality of Claimant's Testimony

The Parties' Positions

Claimant maintained his deposition required approval from Kosovar authorities because Kosovo is not a signatory to the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Convention"). Claimant averred his deposition testimony was taken illegally, although he did not identify any specific law that prohibits consideration of his testimony.

The Director agreed. The Director contended the taking of testimony from a foreign national in a foreign country implicates that country's sovereignty, and therefore parties cannot waive the procedures even where, as here, the foreign sovereign nation has not sought enforcement of its interests. The Director further pointed to the OALJ's administrative notice, In re Cases Involving Foreign Parties, Witnesses, and/or Evidence, 2021-MIS-00006, issued on October 5, 2021, stating it mandates that all parties seeking testimony from witnesses located outside the United States certify they abided by all

applicable foreign laws. The Board noted, however, that by the time the directive was issued, claimant's deposition and hearing testimony had already been admitted into the record, and the parties did not have the benefit of the directive's guidance at the relevant time in the proceedings. Slip op. at 5 n.6. The Board observed that the administrative notice instructs that parties should meet and confer "early in the proceeding" to determine whether a decision on the written record best serves their interests, and states parties "should be prepared" to certify compliance with foreign law prior to offering testimony or evidence procured outside the United States as "[t]he presiding ALJ may make inquiry into such compliance." Id. (emphasis in original). The Director concluded the case should be remanded for the ALJ to determine whether claimant's deposition was taken with permission from Kosovar authorities. If not, he contended it must be excluded from the record. In support of his interpretation of Kosovar's blocking statute, the Director cited a webpage of the U.S. Department of State – Bureau of Consular Affairs, Kosovo Judicial Assistance Information (Nov. 20, 2018), https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/kosovo.html.

Employer disagreed, arguing claimant's voluntary testimony did not violate U.S. law or principles of comity, especially considering the OALJ's personal jurisdiction over claimant by virtue of his voluntarily filing his claim, and the application of the five-factor comity analysis set forth in Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522, 544 n.28 (1987).[4] Employer also maintained claimant and the Director waived this issue by failing to timely object at any time while this case was before the ALJ. Employer argued the United States is not necessarily bound by the laws of a foreign nation when ordering production of discovery from a party subject to its jurisdiction, regardless of whether that country is a signatory to the Hague Convention, and even if that country has specific blocking statutes prohibiting disclosure of a particular type of evidence.

Waiver of Opposition to Admissibility under OALJ Rules

The Board stated that, once a claim proceeds to the OALJ, the ALJ has broad authority over all aspects of the proceedings, prior to and extending into the formal hearing, 33 U.S.C. §§ 923, 927, and is to use "all powers necessary to conduct fair and impartial proceedings." 29 C.F.R. § 18.12(b). The regulation applicable to the ALJ's duties under the Act, 20 C.F.R. § 702.338, provides:

> The administrative law judge shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters . . . . The order in which evidence and allegations shall be presented and the procedures at the hearing generally, except as these regulations otherwise expressly provide, shall be in

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[4] The five factors guiding a court's comity analysis with respect to the production of foreign discovery are: (1) the importance to the investigation or litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located. *Aerospatiale*, 482 U.S. at 544 n.28.

> the discretion of the administrative law judge and of such nature as to afford the parties a reasonable opportunity for a fair hearing.

To that end, the ALJ's authority includes the power to rule on pre-hearing motions, address evidentiary issues through pre-hearing conferences, oversee discovery of relevant evidence (including the taking of depositions), conduct a hearing, and take witness testimony at a formal hearing.

The OALJ Rules of Practice and Procedure ("OALJ Rules") state a party may object to a notice of deposition for reasons that include the qualification of the officer before whom the deposition is to be taken, or to any error or irregularity relating to the manner of the taking of the deposition. 29 C.F.R. § 18.55(d)(2), (3)(ii). If a deposition proceeds, any further objection to any aspect of it must be noted on the record at the time the deposition is taken to preserve the objection. 29 C.F.R. § 18.64(c)(2). Parties forfeit any objections not timely asserted. 29 C.F.R. § 18.55(d)(3)(ii) (additional citation omitted).

In this case, claimant's deposition took place in Kosovo. Claimant's attorney participated in the deposition but never raised any objections to its legality. At the formal hearing, claimant testified from Kosovo via videoconference. Claimant's counsel raised no objections to the admission of the transcript of claimant's deposition and called claimant as a witness. At no point during the hearing did claimant's attorney object to the legality of the taking of claimant's testimony. Having failed to object at any point to the admission of either his deposition or hearing testimony, black-letter law firmly establishes claimant waived any objections under the OALJ rules. 29 C.F.R. § 18.55(d)(3)(ii) (additional citations omitted).

Kosovo's Alleged Blocking Statute

Counter to claimant's and the Director's contentions, the mere existence of a blocking statute, a law designed to prevent the transmission of evidence to another country for the purposes of litigation (such as the one alleged but not identified here), would not categorically prevent the consideration of testimony claimant willingly provided. While it is undoubtedly true, as the Director stated, that obtaining testimony of a foreign national who is physically present in another country implicates the sovereignty of the host country, that recognition does not end the inquiry regarding the admissibility of claimant's already-provided testimony. Slip op. at 8 (citing Aerospatiale, 482 U.S. at 522 ("[blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even if the act of production may violate that statute.")). Indeed, since the Supreme Court's decision in Aerospatiale, the vast majority of courts to consider blocking statutes have found them to be unenforceable in circumstances far more intrusive of another nation's sovereign interests than those at issue here -- where claimant willingly provided and later relied on his own testimony in an effort to gain entitlement to benefits under a U.S. statute.

The Board observed that courts have ordered defendants to violate unequivocal blocking statutes, for example, in ordering discovery not yet conducted to take place. Courts have also held that defendants can waive the application of blocking statutes and service requirements through contract or conduct -- both with regard to countries subject to the Hague Convention and those that are not. And courts have even ordered non-parties to litigation to produce discovery under the threat of sanction in violation of their own country's banking laws.

Against this backdrop, claimant and the Director failed to establish Aerospatiale precludes consideration of claimant's already-provided deposition and hearing testimony. The Board stated that "[w]hile courts interpreting Aerospatiale have frequently applied a five-factor test in evaluating disputes, the Court itself expressly refused to 'articulate specific rules to guide the delicate task' between ordering discovery and applying blocking statutes. Instead, it instructed lower courts to adjudicate conflicts based on their 'knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke.'" Slip op. at 9-10 (quoting Aerospatiale, 482 U.S. at 546). With that in mind, the Board concluded that two fundamental interests compelled it not to remand this case.

First, neither claimant nor the Director identified a Kosovar law or statute at issue, much less attempted to demonstrate Kosovo has shown any interest in enforcing it. While the Director vaguely pointed to statements contained on the State Department's website, neither the Director nor the page referenced identified the operative law. Significantly, U.S. courts have repeatedly held a foreign state's failure to enforce its blocking statute: (1) showed no serious foreign state interest would be undermined by ordering violation of it; and (2) undermined litigants' claims that compelling violation would constitute undue hardship. Claimant and the Director failed to establish the consideration of claimant's testimony would violate Kosovar law, much less attempted to show that Kosovo's sovereign interest in enforcing that law would outweigh the need to consider his testimony in his DBA claim.

The Board further reasoned that:

> Second, by contrast, Claimant's testimony is absolutely essential to the adjudication of his DBA litigation. With that recognition, it cannot be overemphasized that Claimant -- of his own volition -- filed his claim seeking benefits under U.S. law. In doing so, he agreed to have his claim adjudicated in accordance with the DBA, its accompanying regulations, and the general rules, procedures, and practices encountered in the American administrative benefits process. This involves providing all parties an opportunity to be heard in a meaningful manner and at a meaningful time, including the ability to present their respective cases by submitting evidence on the relevant issues, rebuttal evidence, and cross-examining witnesses. Both Employer and Claimant exercised these rights by submitting evidence into the record in support of their respective positions. Indeed, Claimant called himself as a witness at the hearing and relied on his deposition testimony in his post-hearing brief. The case was then fully adjudicated, and the claim resolved in accordance with the Act, the DBA, and the provisions of the Administrative Procedure Act.
>
> Claimant, therefore, had his claim completely considered by the ALJ within the framework and scope of the very U.S. Act he invoked. Given this, it was disingenuous not to object to the legality of Employer's deposition request, to rely on his testimony, and to have his claim fully adjudicated by the ALJ -- only to call foul after it was denied pursuant to an unidentified law he claims was hiding in full sight the entire time. Thus, neither Claimant nor the Director have persuaded us that Kosovar law prohibits the consideration of Claimant's already-provided testimony, particularly since no Kosovar law

> has been cited and no U.S. court or tribunal ordered Claimant to provide it. Aerospatiale, 482 U.S. at 546.

Id. at 10-11 (additional citations omitted).

Section 20(a)

The Board reverse the ALJ's finding that claimant did not invoke the § 20(a) presumption, finding that the ALJ improperly considered claimant's lack of credibility as part of his analysis and otherwise incorrectly weighed the relevant evidence of record at the invocation stage. Rose v. Vectrus Systems Corporation, 56 BRBS 27, 38-39 (2022) (decision on recon. en banc), appeal pending sub nom. Vectrus v. Director, OWCP, No. 3:23-cv-00200 (M.D. Fla.). Claimant presented a PTSD diagnosis from both Drs. Maxhuni and Zubaku to support the harm element. He testified to his work experiences which included exposure to rocket attacks. Therefore, he also showed working conditions which could have caused his psychological symptoms and precipitated his psychological diagnoses.

However, any such error was harmless as the ALJ alternatively continued his analysis as if claimant had established a prima facie case. The Board affirmed the ALJ's finding that employer rebutted the § 20(a) presumption. The ALJ correctly concluded that Dr. Ogden's medical opinion constituted substantial evidence showing either claimant's symptoms are not related to his work for employer or he does not suffer from the claimed harm. After interviewing claimant, administering tests, and reviewing his medical records, Dr. Ogden concluded claimant did not meet the criteria for PTSD under the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-V"). Specifically, she opined claimant failed to demonstrate requirements under Criteria C, the avoidance of stimuli associated with the traumatic event. Moreover, she opined that claimant's reported symptoms and their frequency were too vague to rise to the level of severity typically seen in PTSD. Dr. Ogden further found the timing of the onset of claimant's symptoms was inconsistent with a PTSD diagnosis. While most patients suffering from PTSD report the onset of symptoms in close proximity to the trauma, claimant failed to provide a clear indication of when his symptoms began. Dr. Ogden also found it significant that he did not seek treatment until eight years after his return to Kosovo. She instead diagnosed claimant with major depressive disorder unrelated to employment, opining that it more likely was related to claimant's diagnosis of hepatitis C.

Next, recognizing the ALJ's broad discretion in weighing the evidence and making credibility determinations, the Board affirmed his finding that claimant did not establish by a preponderance of the evidence that his symptoms are connected to his work for employer. The ALJ rationally found claimant's testimony neither consistent nor credible and his treating physicians' opinions diagnosing work-related PTSD unpersuasive because they failed to provide any details specific to claimant showing how or why his symptoms met the criteria for PTSD under the DSM-V. In contrast, he found Dr. Ogden's opinion persuasive because she provided a more comprehensive analysis of claimant's alleged symptoms under the DSM-V framework for diagnosing PTSD, which she noted was an international diagnostic tool meant to surpass background and/or cultural differences. The Board affirmed the ALJ's rational conclusion, based on the medical opinion that claimant does not have PTSD or any

psychological condition related to his DBA employment with employer, that claimant has not established a compensable injury.

[Authority of the Administrative Law Judge in General; Procedure: Administrative Procedure Act, Section 23 and Section 27(a); Admission of Evidence; Defense Base Act; Application of Section 20(a) -- Prima Facie Case, Failure to Properly Apply Section 20(a), Rebutting the Presumption, Evaluating the Evidence]

Garcia v. National Steel and Shipbuilding Co., ___ BRBS ___ (2023).

The Board held that the ALJ properly awarded claimant permanent total disability ("PTD") benefits for the combined disabling effects of his 2009 left shoulder injury and 2010 right knee injury. The date the disability related to the cumulative injury became manifest in 2010 and not the date of the single shoulder injury controls the AWW calculations. The Board further vacated the ALJ's denial of credit to employer under § 14(j).

Claimant worked as a shipyard painter for employer. He sustained a left shoulder injury in October 2009 and a right knee injury in June 2010. Claimant has not returned to any work after June 28, 2010. He filed several claims, including a claim for cumulative trauma to his left shoulder, right knee, and spine.

Following a formal hearing, the ALJ issued a bench decision ("BD&O"), and he subsequently issued a written order ("D&O") incorporating his bench findings. The parties stipulated to the occurrence of the shoulder and knee injuries, but disagreed as to whether these injuries constituted cumulative traumatic injuries resulting in claimant's current disability. The ALJ weighed claimant's testimony and the medical evidence and concluded these injuries created one cumulative traumatic injury with an onset-of-disability date of June 29, 2010. Therefore, he calculated claimant's AWW as of that date, applying § 10(a). The ALJ concluded the cumulative trauma injury rendered claimant temporarily totally disabled beginning June 29, 2010, until he reached MMI for his right knee on June 8, 2014. (The ALJ also found claimant's left shoulder condition had reached MMI on May 21, 2014, but that date did not affect his findings because employer had previously paid TTD benefits from September 28, 2011, through June 8, 2014.) He ordered employer to compare the payments it had already made with the TTD compensation rate he awarded to determine whether additional compensation was owed, or whether employer was entitled to a credit.

Next, the ALJ found that employer failed to establish the availability of suitable alternate employment ("SAE") from June 9, 2014. He analyzed the Labor Market Studies ("LMS") both claimant and employer submitted and found employer's study to be less credible because its vocational consultant mistook claimant's education and English-speaking ability to be more advanced than they actually were. The ALJ determined claimant was unable to perform the tasks of the proffered jobs due to his education, language barriers, and injuries, and therefore was in PTD status as of May 22, 2014. He ordered employer to pay claimant PTD benefits minus a credit for any benefits already paid during this time period. The ALJ also awarded employer relief under § 8(f). Thereafter, the district director issued a letter to the parties calculating the amount of disability benefits owed to claimant.

Employer filed a motion for reconsideration with the ALJ, asserting the district director's calculations did not grant it a credit for the PPD compensation it had paid for claimant's left shoulder injury in 2018-2021. The ALJ denied the motion, finding those payments were not related to the cumulative traumatic injury for which he awarded PTD benefits but arose from

a separate injury. He stated that "Claimant's unscheduled injuries to his right knee and left shoulder together . . . cannot be said to arise from a single injury, *i.e.*, the right knee injury is not a sequela of the left shoulder injury."

Employer appealed, alleging the ALJ erred in finding claimant disabled, in concluding employer failed to identify SAE, in miscalculating claimant's AWW, and in denying employer a credit under § 14(j). The Director, OWCP responded, asserting the ALJ did not comply with the Administrative Procedure Act ("APA"), 5 U.S.C. § 557(c), as his decision to deny employer's request for a credit – set forth in a series of three orders, including a bench decision – was not adequately explained.

Disability

The Board rejected employer's challenge to the ALJ's award of PTD benefits. To obtain PTD benefits, a claimant must show: 1) he is disabled within the meaning of the Act, 2) the disabling work-related injury healed to the fullest extent possible, and 3) he cannot return to prior employment. Further, employer must fail to establish SAE. Here, Employer argued the ALJ ignored inconsistencies in claimant's testimony, pointing to surveillance videos. It listed 32 instances of alleged misrepresentations involving, e.g., claimant's English-speaking proficiency, the extent of his injuries, and his computer and technology skills.

The Board stated that an ALJ has broad discretion, as the finder of fact, to credit one witness's testimony over that of another. As such, the ALJ is entitled to make inferences from surveillance evidence and give medical testimony the weight he determines it deserves, provided the decision is supported by substantial evidence. Here, the ALJ carefully reviewed the record and detailed his rationale for crediting the opinions of three physicians who did not change their opinions after viewing the surveillance video over employer's experts who did. The ALJ found the activities seen on the video were consistent with claimant's self-reporting and did not involve "the type of intensity" needed for full-time work. Moreover, the ALJ's bench decision provided a detailed discussion of the surveillance videos. The ALJ's determinations were not "inherently incredible and patently unreasonable."

Alternatively, employer asserted the ALJ erred in determining it did not establish the availability of SAE. It asserted that the parking lot attendant and customer service order clerk positions did not require a high school or GED diploma and "these employers generally preferred older workers." However, the ALJ found these jobs would be considerably more difficult for claimant to obtain given his language and education barriers. Further, employer's LMS reports did not account for these barriers. Notably, claimant's vocational expert contacted several employers and determined the jobs either required a high school diploma, English proficiency, or exceeded claimant's medical restrictions. Therefore, substantial evidence supported the ALJ's conclusion that employer did not establish SAE.

Average Weekly Wage

Employer next contended the ALJ erred in calculating claimant's AWW. It maintained the ALJ improperly relied on Johnson v. Director, OWCP, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), cert. denied, 499 U.S. 959 (1991), rather than on Deweert v. Stevedoring Services of America, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2001), to determine claimant's left shoulder disability became "manifest" for purposes of calculating AWW. In

Johnson, the claimant's disability was latent and unknown, and did not become evident until more than three years after his accident – three years during which he continued to work. The Ninth Circuit concluded his AWW should be calculated based on the date claimant's disability became manifest, rather than the date of the accident, because claimant was not aware of any impairment to his earning capacity until his disability became manifest. In Deweert, however, the Ninth Circuit used the date the injury occurred to calculate AWW, as the claimant was aware of his injury when it happened and worked with pain for a few weeks before losing time from work due to disability. The court noted Johnson was applicable only in "exceptional cases," where years had elapsed between the initial trauma and the onset of disability, and it concluded the facts and timeline in Deweert were distinguishable.

Here, employer contended Johnson should not be applied because the eight months between claimant's accident and the manifestation of his disability did not constitute an "exceptional case." Instead, employer alleged the ALJ should have applied Deweert and used October 2009 to calculate AWW for claimant's left shoulder injury.

The Board concluded that claimant's AWW should be calculated as of June 29, 2010 – the date the ALJ found his cumulative trauma disability became manifest. Neither Johnson nor Deweert is applicable in this case, as neither dealt with a cumulative trauma injury. The ALJ awarded compensation for a cumulative trauma injury caused by claimant's individual left shoulder and right knee injuries rather than for specific separate injuries to his shoulder and knee. Claimant's PTD award, therefore, is the result of the combination of these two conditions. While the ALJ's use of Johnson was improper, it was harmless error because he arrived at the correct date.

Section 14(j) Credit

The Board vacated the ALJ's finding that employer was not entitled to a credit under § 14(j). According to § 14(j), "if the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." The Act is construed to allow employers who voluntarily paid advance compensation to receive credit for prior payments made.

Employer contended the ALJ erred in failing to award a credit for the amount it paid claimant in PPD compensation in 2018-2021 for his 2009 left shoulder injury. Employer argued these payments constituted an advance payment of compensation under § 14(j) and were subsumed into claimant's later cumulative trauma injury, and that the denial of the credit unjustly overpaid claimant. The Director urged a remand, asserting the ALJ did not adequately explain why he denied the requested credit; he also asserted any such credit would first go to the Special Fund.

The Board stated that the ALJ awarded claimant PTD benefits for the combined disabling effects of his left shoulder and right knee injuries as of May 22, 2014. Employer sought a credit for the PPD benefits it paid claimant for his left shoulder injury in 2018-2021, as the payments were made after the ALJ found claimant's shoulder condition contributed to his PTD. The ALJ denied it because "the payment for the prior left shoulder injury was for a different injury than [his] permanent total award." Notably absent was any further explanation for why they are different injuries.

The ALJ's reliance on Tibbetts v. Bath Iron Works Corp., 10 BRBS 245 (1979), was particularly problematic. In that case, the Board allowed the employer to receive a credit for scheduled benefits paid for a leg injury against a subsequent award for unscheduled benefits for a back injury, when the back injury had caused the leg injury. The award for the back injury "subsumed" the wage loss caused by the leg injury because it included all of the overall disability caused by related sequelae; both injuries shared a root cause. While the ALJ properly distinguished the present case because claimant's injuries did not share a root cause but were the result of two separate incidents, this distinction was insufficient, as payment for a sequela injury is not the only basis for a credit. Here, employer paid PPD benefits for the left shoulder condition and was seeking a credit against a subsequent award of PTD benefits for a disability to which the left shoulder contributed. (Because both injuries contributed to claimant's PTD status and the ALJ awarded one PTD benefit based on the cumulative effect of the two injuries, claimant could not recover a separate total disability award for each individual injury, and thus there was no need to apportion the disabling effects of the two injuries to determine any credit employer may be owed.)

The ALJ's denial also lacked any supportive facts or evidence; it merely concluded claimant's prior left shoulder injury was unrelated to the left shoulder injury that made up a portion of his cumulative trauma award. This warranted remand, considering the evidence suggesting the two shoulder injuries were not only related, they were the same. The only evidence suggesting the existence of two different claims and/or left shoulder injuries was employer's Form LS-206 for claimant's work-related left shoulder injury that allegedly occurred on October 27, 2009, because it was filed under a different claim number. Claimant argued this established the benefits in question were paid pursuant to a separate claim. Employer maintained this form may have been filed under the wrong claim number, but even if it did represent a separate claim, it was still entitled to a credit as the claim was for a related shoulder injury. Regardless, resolution required fact-finding. On remand, the Board instructed the ALJ to consider all relevant evidence and clearly explain his conclusion in accordance with the APA.

[Section 8—Disability -- Extent: Establishing Total Disability – Suitable Alternate Employment — Vocational Evidence; Procedure Before the District Director and Administrative Law Judge -- Administrative Law Judge Adjudication -- Authority of the Administrative Law Judge in General, Decisions under the APA 19 -- Sufficient Rationale; Determination of Pay -- Average Weekly Wage in General (cumulative trauma disability); Credit—Section 14(j)]

Albert v. Marinette Marine Corp., ___ BRBS ___ (2023).

The Board vacated the ALJ's dismissal of the claim as overly harsh and inappropriate.

Claimant filed a claim under the LHWCA seeking benefits for an alleged work-related right knee injury. The case was initially assigned to an ALJ in 2018, who continued the hearing. It was later assigned to a different ALJ ("the ALJ"). The ALJ issued a prehearing order setting the hearing for 02/21/22. On 01/28/22, the parties filed with the ALJ a motion for continuance until July 2022. Nevertheless, on 02/01/22, the ALJ issued a show cause order, stating she had not received any response from the parties and directing the parties, within fourteen days, to show why the claim should not be dismissed for failure to abide by her pre-hearing order. The parties each responded on 02/14/22. Employer noted it would discuss settlement with claimant's counsel. Claimant again requested a continuance due to

the COVID-19 pandemic and claimant's and counsel's unavailability. On 02/17/22, the ALJ issued an order granting a continuance; she further ordered that by 03/03/22 the parties provide her with a proposed scheduling order and stated that failure to do so would result in dismissal. On 03/07/22, two business days after the deadline, the ALJ issued an order dismissing the case, and later denied claimant's motion for reconsideration. Claimant appealed.

The Board noted that neither the Act, its implementing regulations, nor the OALJ Rules specifically address the ALJ's authority to dismiss a claim based on a party's alleged failure to prosecute it in the pre-hearing phase. But see 29 C.F.R. § 18.12(b)(7); id. § 18.21(c) (ALJ may, "after notice and an opportunity to be heard, dismiss the proceeding or enter a decision and order without further proceedings if the party fails to establish good cause for its failure to appear" at the scheduled hearing); id. § 18.57(b)(1)(v) (ALJ may, upon a party's failure to comply with a judge's discovery order, "issue further just orders" which may include "[d]ismissing the proceeding in whole or in part"). Thus, the Board looked to Federal Rule of Civil Procedure ("FRCP") 41(b) that specifically addresses involuntary dismissal and allows the adjudicator to dismiss a claim for, among other things, failure to prosecute or comply with a court order. Slip op. at 6 (citing Fed. R. Civ. P. 41(b); 29 C.F.R. § 18.10(a); Taylor v. B. Frank Joy, Co., 22 BRBS 408 (1989)).

The Board previously held that dismissal of a claim for failure to prosecute under Rule 41(b) is permitted only where there is a clear record of delay or contumacious conduct, or where less drastic sanctions have proved unsuccessful, such as where the claimant willfully disobeyed a court order or has persistently failed to prosecute his claim. Harrison v. Barrett Smith, Inc., 24 BRBS 257 (1991), aff'd mem. sub nom. Harrison v. Rogers, 990 F.2d 1377 (D.C. Cir. 1993), cert. denied, 510 U.S. 1053 (1994) (ALJ did not abuse his discretion in dismissing claims with prejudice based on the claimant's repeated and numerous abuses of the administrative process including his refusal to comply with discovery requests and submit to a medical examination). It cautioned that an ALJ may not dismiss a claim unless a clear record of intentional conduct is shown and even then, she must first consider whether lesser sanctions would serve the interests of justice or have proven unavailing. Id.

Likewise, federal courts have consistently held that dismissal is an extraordinarily harsh sanction that should be used only in extreme situations. Slip op. at 7 (collecting cases). The Seventh Circuit, within whose jurisdiction this claim arose, has stated that dismissal should be used only in extreme situations, when there is a clear record of delay or contumacious conduct, or where other less drastic sanctions have proven unavailing. The appropriateness of this measure depends on all the circumstances of the case, and a court must consider the procedural history and the status of the case. It must consider the essential factors, which include the plaintiff's pattern of and personal responsibility for violating orders, the prejudice to others from that noncompliance, the possible efficacy of lesser sanctions, and any demonstrated merit to the suit. Relatedly, in Twigg v. Maryland Shipbuilding & Dry Dock Co., 23 BRBS 118, 122 (1989), the Board vacated an ALJ's dismissal because he did not consider the relevant factors, including: 1) the degree of personal responsibility on the part of the claimant; 2) the amount of prejudice to the employer caused by the delay; 3) the presence/absence of a drawn-out history of deliberately proceeding in a dilatory fashion; and 4) the effectiveness of sanctions less drastic than dismissal.

In this case, applying the abuse of discretion standard, the Board held that the ALJ's dismissal of the claim with prejudice was too extreme an action at this juncture. First, the ALJ's consideration of the circumstances was incomplete as her various orders contained at least one significant inaccuracy (as to lack of communication from the parties) and neglected other relevant information. The ALJ did not consider the evidence regarding the parties' agreement in terms of proceeding with the claim (namely, that the case not being ripe for a formal hearing) and the evidence indicating ongoing participation in the claim including responses to the ALJ's orders. There was nothing in the record indicating claimant engaged in the type of willful disobedience or dilatory action that would warrant the drastic sanction of dismissal.

Second, there was nothing to show the ALJ considered all of the relevant factors in determining the propriety of dismissal. The evidence strongly indicated both parties believed: 1) the claim was not yet ready for a formal hearing; 2) additional issues may have arisen since the filing of the claim; and 3) the parties remained hopeful that informal discussions would lead to resolution or settlement of the claim. Additionally, there was nothing to suggest employer was prejudiced by any delay in the adjudication because employer agreed with claimant as to the processing of the case, did not request dismissal, and did not object to claimant's motion to reconsider dismissal as a sanction. Furthermore, prior to dismissing the claim, the ALJ did not consider the viability of lesser sanctions such as staying the proceedings until the parties complied with her directives or remanding the case to the district director for further development. Slip op. at 10 (citing 29 C.F.R. § 18.57(b)(1)(iv) (an ALJ may stay further proceedings until her discovery order is obeyed); id. § 18.12(b)(7) (an ALJ has the authority to "remand when not inconsistent with statute, regulation, or executive order"); id. §18.10(c) (an ALJ, with notice to parties, may waive, modify, or suspend any of the OALJ rules "when doing so will not prejudice a party and will serve the ends of justice") (additional citations omitted)). Notably, the ALJ's sanction was one-sided; while employer also failed to meet the scheduling order deadline, only claimant was punished. The Board stated that while it does not condone the missing of deadlines, under the circumstances of this case the sanction imposed by the ALJ was highly disproportionate to the conduct at issue, overly harsh, and inappropriate.

The Board remanded the case for the ALJ to consider alternative, appropriate sanctions after a complete review of the parties' positions. If the ALJ were to find new issues have arisen with respect to the claim as claimant alleged, she should consider whether to remand the case to the district director for further development of the record. *See* 20 C.F.R. § 702.336. Administrative Appeals Judge Jones concurred with the majority's decision to vacate the dismissal and to remand the case; however, she dissented from the BRB's conclusion that the ALJ was precluded from again dismissing the claim if, after review of the totality of the circumstances, she deemed it warranted. Although dismissal with prejudice is an extreme sanction, an ALJ has great discretion in regulating and sanctioning misconduct. Claimant made no effort to contact the OALJ in response to the ALJ's specific directive. His counsel's post-dismissal reasons for not responding to the ALJ's orders were insufficient. Under the law of agency, a client is bound by his chosen attorney's deeds. Claimant's counsel maintained her unavailability for a hearing date made it "pointless" to respond to the ALJ's order. This perceived futility did not obviate her duty to respond timely to explain the situation rather than provide such information only after the claim had been dismissed. Counsel's conduct was potentially indicative of a willful disobedience of the ALJ's order and could rise to the level of contumacious conduct to justify the sanction of dismissal.

However, the ALJ's failure to consider the totality of the circumstances and the viability of lesser sanctions made her decision premature. Nevertheless, on remand, the ALJ should have a full arsenal of sanctions, including an ability to dismiss the claim.

[Procedure Before the District Director and Administrative Law Judge -- The Claim -- Dismissal; Administrative Law Judge Adjudication -- Authority to Dismiss/Party's Failure to Appear/Default, Sanctions]

Harper v. Temco, LLC, __ BRBS __ (2023).

Claimant's counsel, Charles Robinowitz, appealed the ALJ's decision awarding him attorney's fees. In an 18-page decision, the Board vacated the ALJ's hourly rate finding, reduction of 3.1 hours of travel time, and denial of interests on costs. It affirmed the decision in other respects. The case arose in the Ninth Circuit.

Background

The ALJ issued an initial order awarding fees on June 20, 2019. He noted that counsel had extensively litigated his hourly rate and that the evidence submitted was "much the same" as that which had been recently considered and rejected by himself and other ALJs. He saw "no need to revisit the reasoning rejecting" that evidence. The ALJ also rejected evidence of fees awarded at the appellate level, noting he and other ALJs had previously explained how trial level work differs from appellate work. The only previously unexamined evidence was the 2017 Oregon State Bar Economic Survey ("OSB survey"). The ALJ noted that another ALJ had found the 2017 OSB survey supported a rate of $350. The ALJ also found that he and other ALJs had placed counsel in the 75th percentile of practitioners, and again found no reason to revisit that determination. The ALJ found, "[b]ased on the record . . . and the previous determinations of [his] rate, $350 is a reasonable rate for [counsel's] work in 2016." He then updated the hourly rate to 2019 levels. The ALJ also awarded rates for counsel's associate and legal assistants. The ALJ then deducted time for certain hours billed, including 3.1 hours for time spent traveling to and from doctors' offices for conferences and a deposition, as well as time spent on settlement negotiations. He also denied the request for an enhancement on costs as compensation for a delay.

Counsel filed a motion for reconsideration of the hourly rates and included additional evidence, which the ALJ denied as untimely. In April 2020, the Board issued a decision reversing the denial, holding it was timely filed. *Harper v. Temco, LLC*, 54 BRBS 1, 2-3 (2020). The Board remanded for the ALJ to address the motion for reconsideration.

On September 30, 2021, the ALJ issued a second Order Denying Reconsideration, this time on the merits. He refused to admit the new evidence, finding counsel could have obtained and submitted it before the initial fee order was issued. The ALJ awarded additional fees for work performed after the issuance of the initial fee order. Employer moved for reconsideration, arguing the ALJ should not have awarded additional fees because counsel's motion for reconsideration was unsuccessful. The ALJ agreed, and on December 28, 2021, issued an Order Granting Respondents' Motion for Reconsideration and Denying Fees. Claimant appealed the three orders.

Market Rate

The Board held "the ALJ did not sufficiently explain his rejection of counsel's evidence and ultimate calculation of Mr. Robinowitz's market rate, repeatedly stating there was 'no need to revisit' prior analyses by himself and two other ALJs." Slip op. at 6. While an ALJ may advert to prior fee awards under the Act if a claimant has failed to meet his burden of establishing a market rate, in this case, the ALJ "summarily relied" on prior awards to both reject counsel's evidence and to set his market rate "without further discussion." Id. Attempts to define a "market" simply by looking to what other judges award is inherently flawed as consideration of the "relevant community" is broader than prior fee awards under the Act and should include fees attorneys could obtain for similar services in other types of cases.

Moreover, while the ALJ has the discretion to determine the appropriate percentile at which counsel should be compensated, he must fully consider all relevant evidence, provide specific explanations for his findings, and not rely on improper factors. Id. (citing Seachris v. Brady-Hamilton Stevedore Co., 994 F.3d 1066, 1080, 55 BRBS 1, 8(CRT) (9th Cir. 2021)). The Board found that in placing counsel in the 75th percentile, the ALJ failed to adhere to this standard. The ALJ only referenced prior fee awards to support the continued placement of counsel in the 75th percentile. "By summarily rejecting counsel's proffered evidence based on prior awards and adopting percentiles and market rates awarded by other ALJs, the ALJ erroneously 'reverted to the 'tautological, self-referential enterprise' condemned' by the Ninth Circuit." Id. (citing Hernandez v. National Steel and Shipbuilding Co., 54 BRBS 13, 14 (2020), quoting Christensen v. Stevedoring Services of America, 557 F.3d 1049, 1054, 43 BRBS 6, 8(CRT) (9th Cir. 2009)).

The ALJ also erred in rejecting the evidence, that the Ninth Circuit in Seachris later found relevant, namely affidavits of Phil Goldsmith and David Markowitz and the 2014 Morones Survey. In Seachris, the Ninth Circuit held the ALJ erred in rejecting this evidence because it was "old." Although acknowledging the importance of relying on current market conditions, the court emphasized that evidence of historical market conditions is nevertheless relevant evidence of the current market conditions. The Ninth Circuit held the ALJ further erred in rejecting this evidence because it involved rates charged by attorneys practicing commercial litigation. The court instructed that: The question is not whether counsel qualifies as a commercial litigator; it is whether the rates charged by commercial litigators are relevant comparators — i.e., whether the rates involve similar services by lawyers of reasonably comparable skill, experience, and reputation. Therefore, the court held such evidence was sufficient to meet counsel's "initial burden of production" establishing the reasonableness of his requested fee. Id. at 7 (quoting Seachris, 994 F.3d at 1077-1080, 55 BRBS at 6-8(CRT)).

Finally, in this case, the ALJ erred in rejecting evidence of market rates awarded at the appellate level. The Board reasoned that "[t]he ALJ justified excluding this evidence from his analysis because of the differences between appellate and trial work, but did not provide further explanation, instead referencing explanations previously provided by himself [and other ALJs] in prior fee awards. Id. (collecting cases). The Board cited, inter alia, Seachris, 994 F.3d at 1083 n.8, 55 BRBS at 10 n.8(CRT) ("Nothing in the record suggests that the tasks delegated to a paralegal are so dissimilar in trial versus appellate work to justify different rates for paralegals in the trial and appellate phases of litigation.") and Neeley v.

Newport News Shipbuilding & Dry Dock Co., 19 BRBS 138, 141 (1986) (the Board held "a different billing standard need not be applied" to trial work and appellate work).

The Board affirmed the ALJ's award of fees to counsel's associate and legal assistant, as counsel failed to provide satisfactory evidence regarding these professionals' skills and experience. Per counsel's request, the ALJ calculated the associate attorney's hourly rate based on the 2017 OSB. He averaged the 25th percentile for plaintiff general civil litigation ($225 per hour) and the 25th percentile for plaintiff personal injury civil litigation ($250 per hour) to arrive at $238 per hour, then adjusted that rate to $263 to reflect the market rate as of 2019 to account for delay. The ALJ, therefore, analyzed the market rate evidence counsel presented in support of the requested rate of $285 per hour and provided a rational basis for his proxy market rate determination. Likewise, the ALJ did not abuse his discretion in awarding a rate of $150 to legal assistant Ms. Kahn. Claimant's counsel requested $150 per hour for legal assistant Ms. Glisson, but requested $175 per hour for Ms. Kahn. Given the ALJ's broad discretion, counsel has not established the ALJ erred in finding his conclusory statement regarding Ms. Khan's 20 years of experience and reference to one prior fee award insufficient to entitle Ms. Khan to a higher hourly rate than what is customarily charged by paralegals in the Portland community.

Hours Disallowed as Excessive

The ALJ disallowed time spent reviewing a settlement offer and sending a counteroffer as excessive. The ALJ adequately explained the reduction and the BRB affirmed.

Travel Time

The ALJ disallowed 3.1 hours of travel time, finding the travel was local in nature and not in excess of normal travel to support a claim or that normally considered overhead. The ALJ cited Board precedent to determine that the compensability of travel hinges upon whether it is local or non-local, and on appeal the parties agreed with this interpretation. Claimant argued that to the extent the travel *was* local in nature, the Board should overturn earlier cases making such a distinction.

The Board discussed its "somewhat confusing" precedent, then stated the analysis rests on the "reasonableness and necessity" of the travel time, which is "a fact-based inquiry with the burden on the fee applicant." Id. at 12. The Board acknowledged that fee awards may result in "seemingly disparate outcomes, despite similar types of travel." Id. The Board string-cited decisions from various courts of appeals in a footnote. Id. at 13 n.12. In the Ninth Circuit, the "touchstone in determining whether hours have been properly claimed is reasonableness," which is to be assessed by "reference to standards established in dealings between paying clients and the private bar." Id. at 13 (quoting Davis v. City and County of San Francisco, 976 F.2d 1536, 1543 (9th Cir. 1992). Thus, "the standard for evaluating the compensability of fees for travel time is a discretionary one of reasonableness and necessity, based on the ALJ's evaluation of the facts before him." Id. at 14 (citing Lopes v. New Bedford Stevedoring, 12 BRBS 170 (1979)). "Whether the travel is local or non-local does not, on its own, determine the compensability of the time spent travelling; rather, the distance travelled is merely one factor for the ALJ to consider." Id. Other factors "involve the local billing practices within an attorney's geographic area, including whether it is customary to charge paying clients for the same type of travel, to charge travel time at a reduced rate, and/or to include travel time in the calculation of market rates." Id. n.14.

The Board noted the compensability of travel time for an attorney hired by an injured worker outside of his or her geographic area is a separate and distinct area of the law subject to its own standard.

Interest on Costs

The ALJ summarily denied interest on costs, but the Board vacated this finding. The Board noted the Ninth Circuit held in Seachris that the Act allows for an award of interest for delay in payment of costs where there was an "extraordinary outlay of expenses," and the time between payment and reimbursement was "exceptionally protracted." The Board remanded for factual findings on whether the delay in this instance met these requirements.

[Attorney's Fees – Amount of Award – Hourly Rate, Compensable Services, Travel Time]

Ballard v. U.S. Marine Corps/MCCS, ___ BRBS ___ (2023).

In a case arising under the Nonappropriated Fund Instrumentalities Act, claimant appealed the ALJ's Decision and Order awarding benefits, order denying reconsideration, and order denying modification. The Board vacated and remanded regarding claimant's claim for medical benefits for a psychological condition that he allegedly suffered as a sequela of his work-related physical injuries. In all other respects, the Board affirmed the ALJ's findings.

Background

Claimant sustained injuries to his neck, back, knees, and left wrist following a golf cart crash while working for employer. Employer voluntarily paid benefits while claimant was off work. He returned to work in August 2014. On October 2, 2014, claimant visited a psychiatrist and reported psychological symptoms he associated with his golf cart accident. He also reported psychological issues to his orthopedic surgeon, who issued a report and requested authorization for claimant to have a psychological evaluation. In response to this report, in May 2015, employer filed an LS-207 controverting "stress and associated treatment . . . pending further investigation." Claimant filed a claim for compensation on October 5, 2016, for injuries to his "[n]eck, back, bilateral knees, and bilateral wrists." There was no mention of psychological injuries.

The parties stipulated to the neck, back, bilateral knee, and left wrist injuries. The ALJ held a telephone hearing regarding the existence of a right wrist injury and the nature and extent of disability caused by the other injuries. In post-hearing briefing, claimant argued for a psychological injury as a sequela of his orthopedic injuries.

The ALJ later reopened the record and issued a bench decision. The ALJ denied the right wrist injury finding the claimant did not invoke the Section 20(a) presumption (not at issue on appeal). Relying on Section 12, the ALJ concluded the psychological claim raised in claimant's post-hearing brief was untimely because claimant did not file a claim for it, formally amend his pleadings to raise it, or otherwise give notice that it would be an issue. The ALJ found claimant's failure to properly raise and litigate his psychological injury violated Section 12 and his pre-hearing order, as well as prejudiced employer. He therefore declined to consider the psychological injury claim. The ALJ also found employer established the availability of suitable alternate employment ("SAE") and awarded benefits. At the end of the Bench Decision hearing, claimant explained he did not amend his original

claim because he considered the psychological injury to be a sequela of his physical injuries, and sought only medical benefits. The ALJ noted claimant could file a motion for reconsideration. The ALJ later issued a written decision memorializing the Bench Decision.

Claimant then filed a motion for reconsideration, seeking medical benefits for his psychological injury as a sequela of his orthopedic injuries. The ALJ denied the motion, noting that regardless of claimant's arguments that employer was on notice of his psychological injuries, claimant was still expected to litigate his claim before OALJ after receiving the pre-hearing order.

Claimant then filed a motion for modification arguing the ALJ made mistakes of fact in the SAE finding. Claimant argued the ALJ failed to consider "new" work restrictions issued by his doctor in a post-hearing deposition and the ALJ should not have credited employer's labor market survey. The ALJ denied the motion.

Claimant appealed all three decisions.

Psychological Claim

On appeal, claimant and the Director, OWCP, argued employer was not prejudiced because employer was on notice about the potential work-related psychological condition but chose not to pursue an investigation. The Director argued that Section 12 was irrelevant because consequential injuries or natural sequela of timely filed claims are not required to be separately pleaded. The Director further asserted that Section 12 does not apply to bar claims for medical benefits. Finally, the Director argued that the ALJ abused his discretion in failing to reopen the record under 20 C.F.R. § 703.336(b) for the parties to fully litigate the psychological sequela claim.

The Board did not reach the question of whether the psychological condition was a sequela. Instead, it found the ALJ erred in failing to consider the psychological injury claim because claimant only sought medical benefits for this injury, and claims for medical benefits are never time-barred. Therefore, Sections 12 and 13 did not apply.

However, Section 702.336(b) of the regulations does apply. It states that at any time prior to the filing of the compensation order, the ALJ "may in his discretion" consider new issues. The ALJ did not address Section 702.336(b) and the fact that it allows an ALJ to excuse violations of pre-hearing orders. The Board noted that an ALJ is not bound by technical or formal rules of procedure. It also observed that the discretion allowed by Section 702.336(b) "is tempered" by the duty to inquiry fully into the matters at issue in order to best ascertain the rights of the parties (see 20 C.F.R. §§ 702.338, 702.339). Ultimately, the Board declined to hold that the ALJ abused his discretion in not re-opening the record. It noted that "Claimant did not adequately or effectively raise and litigate his psychological injury claim, even if it related only to medical treatment, by waiting until either his post-hearing brief or the conclusion of the Bench Decision to raise the claim specifically for the first time." Slip op. at 10. But because the ALJ did not address Section 702.336(b), it remanded the case for the ALJ to consider whether to address the psychological injury issue in light of the regulations.

Suitable Alternate Employment

The Board affirmed the ALJ's denial of claimant's petition for modification. The ALJ found that the "new" restriction of no prolonged sitting fell within the physical requirements in the jobs identified in the labor market survey, and that claimant effectively told the vocational expert about this restriction. Therefore, there was no "new" restriction to constitute a "change in condition" requiring modification.

Claimant also argued that the vocational expert did not specify the physical requirements or limitations for jobs, but only some requirements and her conclusion that the requirements did not exceed claimant's capabilities. According to claimant, this "hindered" the ALJ's ability to apply the medical evidence to the identified jobs. The Board disagreed, finding that the vocational expert testified she considered claimant's experience and restrictions, and claimant did not show otherwise. The ALJ's findings were rational and supported by the record.

[Section 12—Timely Notice of Injury; ALJ Adjudication -- Raising New Issues; Suitable Alternate Employment]

II. Black Lung Benefits Act

Disclaimer: This case digest is a tool to help you familiarize yourself with common issues and pertinent law. Because unpublished Benefits Review Board decisions are not precedential, they are cited for informational purposes only. This case digest is not a substitute for research and analysis.

1. U.S. Court of Appeals: No decisions were issued.

2. Benefits Review Board:

a. Published Decisions:

Jewell Mullins (obo Gerald B. Kincaid) v. Island Creek Coal Co., __BLR__, BRB Nos. 22-0024 BLA and 22-0024 BLA-A (Nov. 17, 2023)

On November 17, 2023, the Board issued a published decision vacating in part an ALJ's Decision and Order Denying Benefits in a subsequent claim on modification and remanding the claim for further consideration.

This case arose in the Fourth Circuit. The ALJ found that Gerald Kincaid (the "Miner") was not totally disabled from a respiratory or pulmonary impairment and denied benefits. On appeal, the Board first addressed the ALJ's decision to determine whether granting modification rendered justice under the Act before considering the merits of the Miner's request for modification. The Board cautioned that while the Fourth Circuit's decision in Sharpe v. Director, OWCP [Sharpe I], 495 F.3d 125, 128 (4th Cir. 2007), held that an ALJ must consider whether modification renders justice under the Act before granting the relief requested on modification, it did not establish that an ALJ may make that determination at the outset, before considering the merits of the modification petition. The Board explained that while making a threshold determination of whether granting modification renders justice under the Act before considering the modification petition on the merits might make sense in cases of obvious bad faith, a threshold determination is not appropriate in cases without an indication of improper motive.

The Board next addressed the ALJ's finding that the Miner was not totally disabled. The ALJ considered arterial blood gas studies ("ABGs") dated November 29, 2011 (non-qualifying at rest and qualifying during exercise), March 21, 2012 (non-qualifying at rest and during exercise), and November 6, 2012 (non-qualifying at rest and no exercise ABG was administered). The ALJ who decided the case before the Miner requested modification (the "prior ALJ") credited all the ABGs and found that because only the November 2011 exercise ABG was qualifying, and the remaining ABGs were non-qualifying, the ABG evidence did not establish that the Miner was totally disabled. On modification, the ALJ stated that they agreed with the prior ALJ's rationale and "accorded more weight to the more recent, non-qualifying exercising" ABG in determining that the ABG evidence did not establish disability. The Board stated that in finding that the prior ALJ did not make a mistake of fact, the ALJ mischaracterized the prior ALJ's rationale for finding the ABG evidence non-qualifying. Specifically, the Board noted that the prior ALJ did not give greater weight to the most recent exercise ABG on the basis that it was more recent.

Furthermore, the Board found that to the extent the ALJ credited the most recent non-qualifying exercise ABG over the earlier qualifying exercise ABG solely based on recency, the ALJ erred. Citing the Fourth Circuit's decision in Adkins v. Director, OWCP, 958 F.2d 49, 51-52 (4th Cir. 1992), the Board explained that it is irrational to credit later evidence solely based on recency if the evidence shows that a miner's condition has improved. Therefore, it vacated the ALJ's finding that the ABG evidence did not support a finding of total disability and the ALJ's finding that the Claimant did not establish a mistake of fact. Moreover, because the ALJ's consideration of the ABGs affected their analysis of the medical opinions, the Board vacated the ALJ's conclusion that the medical opinions did not support a finding of total disability. Finally, the Board considered the Employer's cross-appeal and agreed that the ALJ erred in failing to consider Dr. Zaldivar's August 2020 deposition.

Judge Boggs authored a concurring opinion to clarify that caselaw does not preclude an ALJ from considering the temporal relationship of evidence in appropriate circumstances. Judge Boggs explained that when an ALJ rationally determines that more recent non-qualifying evidence is more indicative of whether a miner meets a condition of entitlement than earlier qualifying evidence, the ALJ may give greater credit to the later evidence.

Thomas A. Carpenter v. GMS Mine & Repair Maintenance Inc., __BLR__, BRB No. 22-0100 BLA (Sept. 6, 2023)

On September 6, 2023, the Board issued a published opinion reversing in part and remanding an ALJ's decision and order denying benefits. The ALJ considered one pulmonary function test ("PFT"), one arterial blood gas study ("ABG"), and one medical opinion and concluded that Thomas A. Carpenter ("Claimant") did not establish a totally disabling respiratory or pulmonary impairment. After the ALJ found that the Claimant was 65.5 inches tall, they rounded **down** to the nearest lower table height in Appendix B to Part 718, 65.4 inches, and concluded that the PFT was not qualifying. In finding that the ALJ erred in rounding down, the Board stated that the Department of Labor and several circuit courts have long asserted that when a miner's actual height falls between the heights listed in the tables in Appendix B, the ALJ should use the closest **greater** table height to determine the qualifying values. Had the ALJ rounded up, they would have found that the Claimant's pre-bronchodilator FEV_1 value was qualifying. Therefore, the Board reversed the ALJ's finding and held that the pre-bronchodilator PFT was qualifying based on the FEV_1 and FEV_1/FVC ratio.

Because the ALJ's error in weighing the PFT evidence affected their consideration of the medical opinion evidence, the Board also vacated the ALJ's finding that Dr. Feicht's opinion did not establish total disability. Moreover, it stated that the ALJ failed to render factual findings regarding the exertional requirements of the Claimant's usual coal mine employment and failed to compare those exertional requirements with Dr. Feicht's assessment to determine whether Dr. Feicht's opinion supported a finding of total respiratory disability. Therefore, the Board vacated the ALJ's decision in part and remanded the case for the ALJ to reconsider whether the Claimant established total pulmonary disability based on a preponderance of the evidence.

Smith v. Kelly's Creek Resources, __BLR__, BRB No. 21-0329 (June 27, 2023)

In a published opinion issued on June 27, 2023, the Board held that the DOL may request a supplemental medical report from the physician who conducted the DOL sponsored

pulmonary evaluation. The ALJ admitted Dr. Nader's supplemental medical report, obtained as part of a Department of Labor (DOL) pilot program, and awarded benefits after finding that William Smith (the "Claimant") was entitled to invoke the fifteen-year presumption of total disability due to pneumoconiosis and that Kelly's Creek Resources (the "Employer") failed to rebut the presumption. On appeal, the Employer argued that: (1) the ALJ's appointment was consistent with the Appointments Clause; (2) removal provisions rendered the ALJ's appointment unconstitutional; (3) the ALJ erred in admitting Dr. Nader's supplemental medical report; and (4) the ALJ erred in awarding benefits.

Regarding the Employer's Appointments Clause challenges, the Board rejected the Employer's arguments for the reasons explained in Johnson v. Apogee Coal Co., __BLR__, BRB No. 22-0022 BLA (May 26, 2023).

Regarding the Employer's challenges to the constitutionality of the removal protections afforded ALJs, the Board rejected the Employer's arguments for the reasons stated in Howard v. Apogee Coal Co., 25 BLR 1-301, 1-307-08 (2022).

Regarding the DOL pilot program, the Board rejected the Employer's argument that the regulations do not authorize the district director to request a supplemental medical report from the physician who conducted the DOL sponsored pulmonary evaluation. The Board stated that the complete pulmonary evaluation may encompass not only the examining physician's own testing and examination report, but also that physician's review of additional testing and reports developed by other physicians. It added that "if evidence is submitted to the district director which calls into doubt the conclusions of the DOL-sponsored complete pulmonary evaluation and the claims examiner's proposed finding of entitlement, the DOL has authority to submit that evidence to the physician who performed the evaluation for review and provision of a supplemental report clarifying or revising that physician's opinion." Further, because the regulations consider a supplemental medical report to be part of the physician's original medical report, supplemental reports from the physician performing the DOL pulmonary evaluation are not considered "additional rebuttal" reports as the Employer asserted. Further, the Board rejected the Employer's assertion that the ALJ's consideration of Dr. Nader's supplemental report violated its due process rights. Thus, Board affirmed the ALJ's decision to admit Dr. Nader's supplemental report.

Finally, the Board affirmed the ALJ's decision on the merits.

Johnson v. Apogee Coal Co., __BLR__, BRB No. 22-0022 BLA (May 26, 2023)

In a published opinion issued on May 26, 2023, the Board concluded that the ALJ was properly appointed under the Appointments Clause and the ALJ did not deprive the Employer of due process by preventing it from conducting discovery concerning the preamble to the 2001 regulations.

The ALJ found that Apogee Coal Co. (the "Employer") was the responsible operator and Arch Coal, Inc. ("Arch") was the responsible carrier. The ALJ awarded benefits after finding that Kenny Johnson (the "Claimant") was entitled to invoke the fifteen-year presumption of total disability due to pneumoconiosis and the Employer failed to rebut the presumption. On appeal, the Employer argued that: (1) because the ALJ's appointment was not consistent with the Appointments Clause, the ALJ lacked the authority to hear and decide the case; (2) removal provisions rendered the ALJ's appointment unconstitutional; (3) the ALJ erred in finding that Arch was the liable carrier; (4) the ALJ deprived the Employer of due process by

refusing to allow it to obtain discovery from the Department of Labor (DOL) regarding the scientific bases for the preamble to the 2001 regulations; and (5) the ALJ erred in awarding benefits.

In rejecting the Employer's Appointments Clause challenge, the Board found that the Secretary of Labor's ("Secretary") ratification was sufficient to cure the constitutional defect in the ALJ's prior appointment. The Board noted that Congress authorized the Secretary to appoint ALJs to hear and decide cases under the Act. Under the presumption of regularity, the Board presumed that the Secretary had full knowledge of what they were ratifying in the letter dated December 21, 2017. Moreover, the Secretary specifically stated they gave "due consideration" to the ALJ's appointment. Therefore, the Board concluded that the Employer did not overcome the presumption of regularity. Furthermore, the Board noted that the Employer did not cite any authority to support its argument that the Secretary's ratification violated the Administrative Procedure Act. Additionally, the Board rejected the Employer's argument that Executive Order 13843 (the "EO"), which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive service. The Board noted that the EO did not state that the prior appointment procedures were impermissible or violated the Appointments Clause. For all these reasons, the Board rejected the Employer's request to remand the case for a new hearing before a different ALJ.

Regarding the Employer's challenges to the constitutionality of the removal protections afforded ALJs, the Board rejected the Employer's arguments for the reasons stated in Howard v. Apogee Coal Co., 25 BLR 1-301, 1-307-08 (2022).

Regarding the Employer's challenge to the ALJ's finding that Arch was the responsible carrier, the Board rejected the Employer's arguments for the reasons set forth in Bailey v. E. Assoc. Coal Co., __BLR__, BRB No. 20-0094 BLA (Oct. 25, 2022) (en banc), Howard, 25 BLR at 1-308-19, and Graham v. E. Assoc. Coal Co., 25 BLR 1-289, 1-295-99 (2022).

The Board further rejected the Employer's argument that the ALJ violated its due process rights. Before the ALJ, the Employer sought discovery relating to the DOL's deliberative process underlying the preamble to the 2001 regulations. The ALJ granted the Director's motion for a protective order after finding that the Employer's discovery request was not reasonably calculated to lead to admissible and relevant evidence. In affirming the ALJ's ruling, the Board stated that the Employer had the opportunity to submit evidence challenging the science underlying the preamble both when the DOL promulgated the regulations and before the ALJ. Therefore, it concluded that the Employer did not demonstrate how it was deprived of due process.

Finally, the Board affirmed the ALJ's decision on the merits.

b. ***Unpublished Decisions***

Arterial Blood Gas Studies (ABGs)

Exercise ABGs:

David L. Wells v. Heritage Coal Co., BRB Nos. 22-0333 BLA and 22-0333 BLA-A (April 27, 2023): The ALJ considered three ABGs, which were taken in December 2017, November 2018, and October 2020. All three ABGs were non-qualifying at rest, but the December 2017 ABG was qualifying during exercise. The ALJ gave more weight to the non-qualifying resting ABGs and found that the ABG evidence did not establish total disability. The Board agreed with the Claimant that the ALJ erred in crediting the non-qualifying resting ABGs over the only exercise ABG. The Board concluded that because the ALJ did not explain why the resting ABGs outweighed the exercise ABG, the ALJ's decision did not satisfy the APA. Moreover, the Board stated that the ALJ failed to render a finding regarding the exertional requirements of the Claimant's usual coal mine work, which was necessary to determine whether the exercise ABG was more probative than the resting ABGs. Finally, the Board stated that the ALJ erred in using recency to credit the non-qualifying resting ABGs over the qualifying exercise ABG. Therefore, it vacated the ALJ's finding that the ABG evidence did not establish total disability and remanded the case for further consideration.

Lawrence A. Coleman v. Apogee Coal Co., LLC, BRB Nos. 21-0452 BLA and 21-0452 BLA-A (Feb. 23, 2023): The Board concluded that the ALJ did not provide valid reasons for resolving the conflicting ABG evidence. The record contained three ABGs. The oldest was non-qualifying at rest and qualifying during exercise, while the two most recent were non-qualifying at rest and did not contain exercise results. In giving more weight to the recent ABGs, the ALJ first found that the increase in resting pO_2 values across the ABGs suggested that the more recent ABGs better reflected the Claimant's ability to perform their last coal mine job. Because the record did not contain a medical opinion to support that interpretation of the ABGs, the Board concluded that the ALJ erred in discounting the exercise ABG on that basis. Next, the ALJ found that because the exercise ABG required greater exertion than the Claimant's last coal mine work, the exercise ABG was less reliable than the two recent resting ABGs. In concluding that the ALJ erred in finding the exercise ABG less reliable than the resting ABGs, the Board stated that no physician explained the exertion required of the Claimant during the exercise ABG and the ALJ did not explain their basis for finding it more strenuous than the Claimant's usual coal mine work. Finally, the Board found that recency was not a valid reason to credit the non-qualifying resting ABGs over the earlier qualifying exercise ABG. The Board noted that the Fourth Circuit has held that an ALJ cannot credit evidence solely based on its recency unless it shows that the Claimant's condition has worsened. Therefore, the Board vacated the ALJ's finding that the Claimant did not establish total disability and remanded the case for further consideration.

John Beishline v. Jeddo-Highland Coal Co., BRB No. 22-0436 BLA (Nov. 16, 2023): The Board found that the ALJ erred in weighing the PFT evidence. The ALJ considered a PFT from May 2019, which was qualifying before and after bronchodilators, and a PFT from March 2020, which was not qualifying before or after bronchodilators. The ALJ found that both PFTs were valid and concluded that because the March 2020 PFT was more recent, and because the Claimant gave more effort when performing it, it was entitled to more weight than the May 2019 PFT. The Board stated that the ALJ erred in crediting the non-qualifying PFT over the qualifying PFT based on the Claimant's alleged better effort on the non-qualifying PFT. It emphasized that the ALJ found both PFTs valid and did not cite any credible medical evidence to show that the Claimant gave more effort when performing the non-qualifying PFT. Moreover, the Board held that the ALJ erred in crediting the more recent non-qualifying PFT over the qualifying PFT based on its recency. Therefore, it vacated the ALJ's finding that the Claimant failed to establish total disability based on the PFTs and remanded the case for further consideration.

Donald R. Thornton v. Energy Plus, Inc., BRB No. 21-0586 BLA (Mar. 16, 2023): The Board held the ALJ erred in finding that the most recent ABGs were better indicators of the Claimant's pulmonary condition. The ALJ considered four ABGs taken on the following dates with the following results: November 3, 2016 (non-qualifying at rest and qualifying during exercise); September 22, 2017 (non-qualifying at rest and during exercise); September 6, 2018 (non-qualifying at rest and qualifying during exercise); and September 17, 2018 (non-qualifying at rest and the Claimant did not undergo an exercise ABG). The ALJ disregarded the November 2016 ABG after finding it "more remote" in time from the other ABGs. They found the September 2017, September 6, 2018, and September 17, 2018 ABGs "more contemporaneous" with one another and entitled to greater probative weight given their recency. Thus, they concluded that the ABGs did not establish a totally disabling respiratory impairment. The Board noted that 323 days separated the November 2016 and September 2017 ABGs, while 349 days separated the September 2017 and September 6, 2018 ABGs. As more time separated the latter ABGs, the Board concluded that the ALJ failed to explain why the November 2016 ABG was "remote" in time from the other ABGs, but the September 2017 ABG was "more contemporaneous" with the 2018 ABGs. Additionally, because ALJs must evaluate disability evidence both qualitatively and quantitively, without mechanically crediting later evidence and without reference to the chronological order of evidence when a miner's condition improves, the Board concluded that the ALJ erred in evaluating the ABGs based on recency alone. Therefore, it vacated the ALJ's finding that the Claimant was not totally disabled and remanded the case for further consideration.

Terminal Hospitalization ABGs (20 C.F.R. § 718.105(d))

Geraldine R. Mullins (survivor of Donald C. Mullins) v. Clinchfield Coal Co., BRB No. 21-0363 BLA (April 17, 2023):The majority affirmed the ALJ's decision to find that two ABGs contained in the Miner's treatment records, both of which were qualifying and performed during the Miner's terminal hospitalization, met the requirements of 20 C.F.R. § 718.105(d), which provides that an ABG administered during a hospitalization that ends in the miner's death must be accompanied by a physician's report establishing that a chronic respiratory or pulmonary condition produced the results. The ALJ noted that Dr. Perper discussed the ABGs in their medical report and opined the ABGs showed "severe hypoxemia and hypercapnia during the Miner's last hospitalization." Dr. Perper also reviewed the Miner's treatment records and noted the Miner was diagnosed with COPD, coal workers' pneumoconiosis, asthma, and chronic bronchitis. The ALJ relied on Dr. Perper's report to conclude that the ABGs were produced by a chronic respiratory or pulmonary condition. The majority found that because Dr. Perper discussed the ABGs, the treatment records, and the Miner's chronic respiratory diseases, including pneumoconiosis, the ALJ permissibly found Dr. Perper's opinion sufficient to establish that a chronic respiratory condition produced the ABG results. Judge Boggs authored a dissenting opinion and opined that the ALJ did not adequately address (1) whether Dr. Perper's opinion established that a chronic respiratory or pulmonary condition produced the qualifying ABGs; (2) whether, if Dr. Perper's opinion did meet the requirements of a 20 C.F.R. § 718.105(d) physician's report, it was well-reasoned and supported by substantial evidence; and, if so, (3) whether Dr. Perper's opinion outweighed contrary evidence. Therefore, Judge Boggs would have vacated the ALJ's finding that Dr. Perper's opinion met the requirements of 20 C.F.R. § 718.105(d) and their findings that the ABG evidence and the evidence overall established that the Miner was totally disabled.

Clinical Pneumoconiosis

X-ray Quality

Robert L. McCowan v. Laurel Run Mining Co., BRB No. 22-0501 BLA (Dec. 5, 2023): The Board found that the ALJ erred in giving less weight to an x-ray taken in May 2018 due to its quality. Because two doctors opined the May 2018 x-ray had a grade two quality rating and only one opined it had a grade one quality rating, the ALJ gave it less weight than they gave to the other x-ray of record, which was taken in September 2018. The Board emphasized that the regulations do not require x-rays to be of optimal quality. Rather, x-rays only need to "be of suitable quality for proper classification of pneumoconiosis." 20 C.F.R. § 718.102(a). Citing the Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses (2011), the Board stated that a grade one quality rating specifies the image is "[g]ood" and a grade two quality rating specifies the image is "[a]cceptable, with no technical defect likely to impair classification of the radiograph for pneumoconiosis." Because no physician opined that the May 2018 x-ray was unreadable or unsuitable for classifying pneumoconiosis, the Board vacated the ALJ's finding that it was entitled to less weight and remanded the case for further consideration.

Complicated Pneumoconiosis

CT Scan Evidence

Shane D. Sutton v. Middleton Mining, LLC, BRB No. 22-0304 BLA (Oct. 23, 2023): The Board affirmed the ALJ's decision to give little probative weight to Dr. Adcock's interpretations of six CT scans because Dr. Adcock's diagnosis of granulomatous disease was unsupported by any evidence showing that the Claimant was diagnosed with, treated for, or otherwise suffered from granulomatous disease.

Pseudoplaques

Billy D. Stidham v. Abundance Coal, Inc. #3, BRB No. 21-0357 BLA (Mar. 16, 2023): The Board affirmed the ALJ's finding that the Claimant had complicated pneumoconiosis. Drs. DePonte, Rosenberg, and Adcock all agreed that the CT scan evidence showed pseudoplaques measuring at least one centimeter, but they disagreed regarding whether the pseudoplaques constituted complicated pneumoconiosis. Dr. DePonte explained that pseudoplaques were pulmonary opacities formed by the same coalescence and caused by the same coal mine dust as central large opacities. They added that the ILO Guidelines defined a large opacity as having a longest dimension exceeding ten millimeters without regard to its location. While they acknowledged that pseudoplaques could be associated with conditions other than pneumoconiosis, they opined that no evidence of another condition existed in the Claimant's case. In contrast, Drs. Rosenberg and Adcock opined that the pseudoplaques were not large opacities consistent with complicated pneumoconiosis. Dr. Adcock opined that pseudoplaques were "sheaths" of coalescent small opacities consistent with simple pneumoconiosis rather than "masses" that progressed into the parenchyma of the lung. Similarly, Dr. Rosenberg agreed that pseudoplaques were a "coalescence of nodules along the pleural surface," but they opined they were not consistent with complicated pneumoconiosis, which they described as large opacities with nodular densities surrounded by lung tissue. Because the regulations do not place limits on the shape or location of a large opacity associated with chronic dust disease, the ALJ found Drs. Adcock's and Rosenberg's opinions unpersuasive. Finding that Dr. DePonte convincingly explained that the Claimant's pseudoplaques constituted complicated pneumoconiosis, the ALJ concluded that the Claimant had complicated pneumoconiosis. As the Employer did not articulate any errors in the ALJ's credibility determinations, the Board affirmed the ALJ's finding that the evidence established complicated pneumoconiosis.

Department of Labor (DOL) Pulmonary Evaluation

Additional Testing under 20 C.F.R. § 725.406(c)

In Jimmy D. Burke v. Glamorgan Coal Corp., BRB No. 22-0374 BLA (Sept. 22, 2023), the Board granted the Director's request to vacate the ALJ's denial of benefits. Dr. Green examined the Claimant on behalf of the DOL. In their report, Dr. Green wrote that the DOL-sponsored PFT was invalid based on varied measurements. Dr. Goodman reviewed the PFT results and agreed that they were invalid for assessing the Claimant's respiratory impairment. Therefore, the ALJ did not consider the DOL-sponsored PFT. On appeal, the Director conceded that the DOL failed to provide the Claimant with a complete pulmonary evaluation and the

DOL should have arranged for the Claimant to undergo a second PFT. Therefore, the Board remanded the case to the district director for further evidentiary development.

Insufficient Opinion on Total Disability

In Aaron Gambill v. Consol, Inc., BRB No. 21-0610 BLA (May 10, 2023), the Board remanded the case for a second time after concluding that the DOL failed to give the Claimant a complete pulmonary evaluation under 20 C.F.R. § 718.101(a) and 20 C.F.R. § 725.406. The first time the case was before the Board, the Board vacated the ALJ's decision after the Director conceded that because the DOL-sponsored PFT was invalid, the DOL failed to give the Claimant a complete pulmonary evaluation. On remand, the Claimant underwent another PFT, and Dr. Habre authored a supplemental report stating that because the PFT was not qualifying, the Claimant was not totally disabled. After the ALJ again denied benefits, the Claimant appealed. On appeal, the Director again conceded that the DOL failed to satisfy its obligation to provide the Claimant with a complete pulmonary evaluation. Because Dr. Habre relied solely on the non-qualifying PFT, without considering other factors or the exertional requirements of the Claimant's usual coal mine work, the Director argued that Dr. Habre's report did not contain sufficient information from which to determine if the Claimant was totally disabled. The Board granted the Director's request for a remand, vacated the ALJ's denial of benefits, and remanded the case for another supplemental DOL-sponsored medical report.

Dependents

Augmented Benefits for a Dependent Child

In Justine Bailey (Survivor of James Bailey) v. Ronnie Ison Trucking, BRB No. 21-0308 BLA (Mar. 3, 2023), the Board affirmed the ALJ's conclusion that Anthony Bailey, the Claimant's stepson, was unmarried, suffered from a disability, and satisfied the dependency requirements for augmented survivor's benefits. The Board agreed with the ALJ that although Anthony was previously married and divorced, the regulations do not require an augmentee to have never been married. Additionally, the Board rejected the Employer's assertion that because Anthony did not become disabled until they were twenty-seven years old, they were ineligible for benefits. The Board stated the ALJ accurately found that the Employer confused the standards for a dependent qualifying for survivors benefits in their own right (20 C.F.R. § 725.221) with the standards for a dependent qualifying as an augmentee (20 C.F.R. § 725.209). The Board added that in revising the regulation at 20 C.F.R. § 725.209, the Department stated that a child who claims benefits in their "own right based on personal disability (child/beneficiary) must prove the disability arose before age 22." However, a "dependent child who is an augmentee of a beneficiary… is exempt from this requirement because the statutory definition of 'dependent' explicitly exempts a 'child' from the requirement that disability begin by a certain age." Therefore, the Board affirmed the ALJ's finding that Anthony met the relationship and dependency requirements for a child augmentee, and that the Claimant was entitled to augmented survivor's benefits.

Efficient Decision Drafting

In Earnest D. Anderson v. Ewell Spradlin Coal Co., BRB No. 21-0434 BLA (Jan. 10, 2023), the Board stated that because Dr. Forehand opined that the Claimant had both clinical and

legal pneumoconiosis, the ALJ properly did not consider Dr. Forehand's opinion in determining whether the Employer rebutted the presumption of pneumoconiosis.

Evidence Limitations

Autopsy Reports

In Nancy Blevins (survivor of Onzie Blevins) v. Island Creek Coal Co., BRB No. 22-0522 BLA (Oct. 23, 2023), the Board affirmed the ALJ's finding that Dr. Perper's report, submitted by the Claimant, was admissible both in rebuttal to Dr. Caffrey's report, which the Employer designated as its affirmative autopsy report, and as an affirmative medical report because Dr. Perper reviewed other medical evidence in addition to the autopsy slides. On their evidence summary form, the Claimant also designated a report from Dr. Helms, the autopsy prosector, as an affirmative autopsy report. The Board stated that the ALJ properly recognized that, under 20 C.F.R. §725.414(a)(2)(ii), a party may submit both an affirmative autopsy report and, where the opposing party has submitted an affirmative autopsy report, a rebuttal autopsy report. Therefore, it affirmed the ALJ's decision to admit both Dr. Perper's report and Dr. Helms' report.

Binding Parties to their Evidence Summary Forms

In Stella Holstein v. Eastern Associated Coal Co., BRB No. 21-0256 BLA (Jan. 11, 2023), the Board concluded that because the ALJ informed the parties, at the hearing, that they would hold them to their written evidentiary designations, the ALJ did not abuse their discretion in excluding Dr. Caffrey's autopsy report, which the Employer mis-designated on its ESF as an affirmative biopsy report.

In Larry R. Setser v. Eastern Associated Coal Co., BRB No. 20-0368 BLA (Jan. 9, 2023), the Board affirmed the ALJ's decision to exclude medical reports by Drs. Zaldivar and Jarboe, which were not on the Employer's Evidence Summary Form (ESF). The Employer had already designated on its ESF medical reports by Drs. Broudy and Rosenberg. The Board rejected the Employer's argument that the ALJ erred in notifying the Employer of a decision to exclude both reports in the Decision and Order rather than in a separate evidentiary order. The Board noted that the Employer never tried to amend its ESF or argue good cause to admit evidence in excess of the evidence limitations. Citing L.P. [Preston] v. Amherst Coal Co., 24 BLR 1-57, 1-63 (2008) (en banc), the Board concluded that the ALJ's actions satisfied "the principles of fairness and administrative efficiency" and remanding the case for the Employer to argue good cause or re-designate evidence would impede, rather than promote, fairness and administrative efficiency.

Introducing Evidence under 20 CFR 725.456(b)(2) (Twenty-Day Rule)

In Lewis E. Dunbar, Sr. v. Pinnacle Mining Co., LLC, BRB No. 22-0289 BLA (Aug. 24, 2023), the Board affirmed the ALJ's decision to deny the Employer's request to submit additional evidence after the hearing. Before the hearing, the Employer amended its Evidence Summary Form (ESF) and moved Dr. Meyer's interpretation of the October 2019 x-ray from its rebuttal evidence to an affirmative x-ray slot. After receiving the Employer's updated ESF, and three days before the hearing, the Claimant amended their ESF and designated Dr. Crum's interpretation of the October 2019 x-ray in rebuttal to Dr. Meyer's newly designated x-ray interpretation. At the hearing, the Employer sought to obtain Dr. Meyer's

deposition post-hearing given that the Claimant had amended their ESF. The ALJ ruled that absent good cause or the consent of the parties, the parties were required to exchange evidence no later than twenty days before the hearing in compliance with 20 C.F.R. §725.456(b)(3). Because the Claimant objected to Dr. Meyer's deposition and the Employer failed to show good cause for developing the late evidence, the ALJ denied the Employer's request. In affirming the ALJ's ruling, the Board emphasized that 20 C.F.R. §725.456(b) does not require the parties to submit final evidentiary designations twenty days before the hearing. Rather, it requires the parties to exchange evidence twenty days before the hearing. Because the Claimant had exchanged Dr. Crum's October 2019 x-ray well before the twenty-day deadline, the Board concluded that the ALJ did not abuse their discretion in permitting the Claimant to amend their ESF and denying the Employer's request to depose Dr. Meyer.

Modification of a Subsequent Claim

In David L. Brown v. Mingo Logan Coal Co., BRB No. 22-0036 BLA (May 3, 2023), the Board declined to extend its holding in Rose v. Buffalo Mining Co., 23 BLR 1-221, 1-226-28 (2007), to subsequent claims. In Rose, the Board held that when a petition for modification is filed on a claim arising under the amended regulations, each party may submit its full complement of medical evidence allowed by 20 C.F.R. § 725.414 (i.e., additional evidence to the extent the evidence already submitted in the claim is less than the full complement allowed) plus the additional medical evidence allowed on modification by 20 C.F.R. § 725.310(b). The Employer asked the Board to find that in a subsequent claim, a party may backfill slots from a prior closed claim. In denying the Employer's request, the Board explained that while modification preserves the underlying claim, a subsequent claim does not reopen a claimant's prior closed claims. Thus, the Board concluded that the ALJ properly found that no regulatory authority existed to extend the Board's holding in Rose to subsequent claims.

Treatment Records

In James Allen Braham v. ICG Tygart Valley, LLC, BRB Nos. 22-0328 BLA and 22-0328 BLA-A (Sept. 21, 2023), the Board affirmed the ALJ's evidentiary ruling that an x-ray taken specifically for purposes of litigating the Claimant's state claim for benefits was not a treatment record. Although the x-ray was later considered by physicians during the Claimant's treatment, the Board emphasized that the physician who initially interpreted the x-ray did not interpret it during a hospitalization or for the purpose of treating the Claimant. Because the Employer had already submitted its full complement of x-ray interpretations under the evidence limitations and the Employer did not allege good cause for otherwise admitting it, the Board concluded that the ALJ did not abuse their discretion in excluding the x-ray.

Exertional Requirements of Usual Coal Mine Employment

In John S. George v. Commercial Testing & Engineering Co., BRB No. 22-0162 BLA (Sept. 27, 2023), the Board affirmed the ALJ's finding that the Claimant's usual coal mine work required at least medium manual labor. In weighing whether the ALJ accurately determined the exertional requirements of the Claimant's usual coal mine job, the Board noted that while the ALJ was not required to apply Social Security regulations in making a determination, the Claimant's testimony, which the ALJ credited along with the Claimant's

claim for benefits, was consistent with the Social Security regulations' definition of medium work, which involves "lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds." Therefore, it held that substantial evidence supported the ALJ's finding that the Claimant's usual coal mine work involved at least medium manual labor.

In Virginia Workman (obo and Survivor of Lee R. Workman) v. Flat Gap Mining Co., Inc., BRB Nos. 21-0292 BLA and 21-0293 BLA (Mar. 10, 2023), the majority affirmed the ALJ's decision that the Miner's usual coal mine work involved light physical exertion. For the last eight to nine months of coal mine employment, the Miner worked as a lighthouse attendant. Before that, the Miner worked as a roof bolter. On their claim for benefits, the Miner wrote that they transferred to less dusty conditions for their health, but they later testified that they were offered the lighthouse position because they had seniority, and the prior lighthouse attendant was retiring. They added that it was getting "hard to keep up" with the bolting machine work, they wanted to "get out" of the mines, and the lighthouse position was easier. The Board affirmed the ALJ's finding that the Miner's job as a lighthouse attendant was their most recent coal mine employment that the Miner performed regularly over a substantial period. It also found that the ALJ permissibly determined the evidence did not establish that the Miner transferred jobs because of their respiratory inability to do the work of a roof bolter. Therefore, it affirmed the ALJ's conclusion that the Miner's usual coal mine employment was as a lighthouse attendant and that it required light labor. In a dissenting opinion, Chief Judge Gresh stated that they would reverse the ALJ's finding that working as a lighthouse attendant was the Miner's usual coal mine employment, reverse the ALJ's finding that the Miner's usual coal mine employment required light manual labor, and vacate the ALJ's analysis of the medical opinions. Specifically, they stated that "the nearly three decades that the Miner labored as a roof bolter throughout his entire career of 30.48 years of coal mine employment, rather than the Miner's last makeshift work that they performed for merely eight to nine months as a lighthouse attendant at the very end of their career, requiring light physical exertion, constitutes their 'regular' and 'substantial' employment for the purposes of determining disability." Therefore, Judge Gresh would have remanded the case for further consideration.

In Stephen R. Egnor v. Eastern Associated Coal Corp., BRB No. 21-0224 BLA (Jan. 27, 2023), the Board noted that The Dictionary of Occupational Titles (DOT) defines heavy work as exerting fifty to 100 pounds of force occasionally and/or exerting twenty-five to fifty pounds of force frequently. The Board concluded that the ALJ permissibly credited the Claimant's testimony that they lifted fifty-pound rollers, and it affirmed the ALJ's finding that the Claimant's usual work required heavy exertion.

Legal Pneumoconiosis

Reliance on the Preamble

In Anna J. Hoskins (obo George Hoskins) v. Big Elk Creek Coal Co., BRB No. 23-0056 BLA (Oct. 16, 2023), the Board rejected the Employer's assertions that: (1) the ALJ erred in relying on the preamble to the revised 2000 regulations to discredit the opinions of the Employer's physicians; and (2) the ALJ improperly treated the preamble as a binding rule that created an "impossible" burden of proof. The Board cited cases from five federal circuits that have all held that an ALJ may evaluate expert opinions in conjunction with the preamble, which sets forth how the DOL resolved questions of scientific fact relevant to the

elements of entitlement. The Board stated that the ALJ permissibly evaluated the opinions of Drs. Rosenberg and Tuteur in conjunction with the DOL's discussion of the prevailing medical science set forth in the preamble. Moreover, it stated that the ALJ did not substitute their own opinion for that of the Employer's physicians; rather, the ALJ properly evaluated whether the physicians satisfied the Employer's burden of disproving the existence of legal pneumoconiosis.

Length of Coal Mine Employment

In Anita Baldwin (obo Eddie D. Baldwin) v. Island Creek Kentucky Mining, BRB No. 21-0547 BLA (July 14, 2023), which arose in the Fourth Circuit, the Board declined to apply Shepherd v. Incoal, Inc., 915 F.3d 392, 402 (6th Cir. 2019) and the formula at 20 C.F.R. § 725.101(a)(32)(iii) to calculate the length of the Miner's coal mine employment. In footnote eleven, the Board stated the following about the problematic nature of the circuit split on this issue: "Although recognizing that a circuit split concerning how to apply a fundamental aspect of a national act is extremely problematic and can lead to what may be considered arbitrary results based on where a miner performed their last coal mine employment, we are not writing on a blank slate. Given the relevance of existing Fourth Circuit law, the Board's longstanding interpretation of the regulation in published decisions, and the Department of Labor's position, we believe the better practice is to continue to show restraint and allow the Fourth Circuit to rule on the issue – without otherwise commenting on the merits of Shepherd."

Modification

Justice Under the Act

In Nancy Blevins (survivor of Onzie Blevins) v. Island Creek Coal Co., BRB No. 22-0522 BLA (Oct. 23, 2023), the Board agreed with the Director that the ALJ failed to evaluate whether the Claimant's request for modification rendered justice under the Act. Although neither the Employer nor the Claimant specifically raised this argument before the Board, the Claimant stated in their brief before the ALJ that their request for modification was in good faith and not futile. The Board specified that whether modification renders justice under the Act is a determination the ALJ must make, and, in doing so, the ALJ must consider the need for accuracy, the quality of the new evidence, the moving party's diligence and motive, and whether a favorable ruling would be futile. Therefore, the Board directed the ALJ to consider these factors if the ALJ determines on remand that the Claimant is entitled to an award of benefits on modification.

In Linda F. Smith (survivor of Reaford Smith) v. Eastern Coal Corp., BRB No. 21-0388 BLA (June 27, 2023), the Board stated that because it could discern why the ALJ granted the Claimant's request for modification, the ALJ did not need to more specifically address each of the factors regarding whether granting modification rendered justice under the Act. The Board stated that once the ALJ determined that the Claimant could invoke the § 411(c)(4) presumption of death due to pneumoconiosis and the Employer failed to rebut it, the Claimant showed that the modification request was not futile and the need for accuracy became the overriding factor in favor of granting the request for modification.

In Greta G. Privett (widow of Mert E. Privett, Sr.) v. Itmann Coal Co., BRB No. 22-0038 BLA (Feb. 22, 2023), the Board affirmed the ALJ's finding that modification rendered justice

under the Act. The Employer argued that because treatment records and two medical reports the Claimant submitted were available to them before the district director denied benefits in their underlying claim, but the Claimant waited to submit them until they filed a request for modification, the Claimant acted in bad faith. In rejecting the Employer's argument, the ALJ found that reviewing all the evidence would promote an accurate adjudication. The ALJ further found that the Employer's suspicions of bad faith were insufficient to establish that the Claimant acted in bad faith. In affirming the ALJ's decision, the Board stated that the Employer did not provide any evidence to support its argument that the Claimant's motive was suspect. Additionally, it stated that in determining whether the district director made a mistake of fact, the ALJ was authorized to consider new evidence, cumulative evidence, or merely reconsider the initial evidence. It further emphasized that even if the evidence was available at an earlier stage in the proceeding, the ALJ could not deny modification out of hand solely on that basis. Thus, the Board concluded that the ALJ properly weighed all the evidence and affirmed the ALJ's award of benefits on modification.

Onset Date for Paying Benefits

In Chester Jones v. ICG Hazard, LLC, BRB No. 23-0189 BLA (Nov. 9, 2023), the Board affirmed the ALJ's finding that the Claimant was entitled to benefits based on complicated pneumoconiosis and that benefits should commence in April 2017. The ALJ found that an x-ray taken in March 2017 was positive for simple, but not complicated, pneumoconiosis and an x-ray taken in February 2020 was positive for complicated pneumoconiosis. The ALJ concluded that the record did not establish when the Claimant's simple pneumoconiosis became complicated pneumoconiosis, but it did show that the Claimant developed complicated pneumoconiosis at some point before the February 2020 x-ray was taken. The Board concluded that the ALJ rationally found that April 2017 was the earliest date benefits could commence, which was the month after the March 2017 x-ray showed only simple pneumoconiosis.

In Michael B. Ireland v. Manor Mining & Contracting, Inc., BRB No. 22-0155 BLA (July 26, 2023), which arose in the Third Circuit, the sole issue before the ALJ and on appeal was the commencement date of benefits in an award based on the irrebuttable presumption of complicated pneumoconiosis. The ALJ considered the following evidence in determining when the Claimant developed complicated pneumoconiosis: (1) Dr. Costa's report of a biopsy taken on August 5, 2008; (2) two interpretations of an x-ray taken on October 30, 2017; and (3) Dr. DePonte's interpretation of a CT scan taken on August 7, 2018. In the biopsy report, Dr. Costa described a 1.7-centimeter "pneumoconiotic nodule" in the right upper lobe specimen and diagnosed the lung resections as "consistent with coal workers' pneumoconiosis with formation of coal nodules." The ALJ concluded that Dr. Costa did not specifically diagnose massive lesions or state whether the 1.7-centimeter nodule would appear as one centimeter or greater on an x-ray. Therefore, the ALJ found the biopsy evidence insufficient to establish complicated pneumoconiosis in 2008. The ALJ determined that because Dr. DePonte diagnosed complicated pneumoconiosis and provided an equivalency determination, the CT scan was the first "definitive diagnosis" of complicated pneumoconiosis. Therefore, the ALJ awarded benefits commencing in August 2018. The majority noted that in the Third Circuit, biopsy evidence can support a finding of complicated pneumoconiosis when a physician diagnoses massive lesions or when an evidentiary basis exists for the ALJ to make an equivalency determination between the biopsy and x-ray findings. It added that the Board has construed this to require the ALJ to make an equivalency determination if the record permits. The majority agreed with the Claimant that the ALJ failed to adequately consider

whether Dr. Costa's observation of the large pneumoconiotic nodule constituted a massive lesion or whether all the evidence, when weighed together, showed that the Claimant had complicated pneumoconiosis in 2008. Therefore, it remanded the case for the ALJ to consider whether the biopsy evidence established complicated pneumoconiosis under 20 C.F.R. § 718.304(b) and whether, considering all the evidence, the 1.7-centimeter pneumoconiotic nodule observed in 2008 would appear as one centimeter or greater on an x-ray. In a dissenting opinion, Judge Buzzard opined that the ALJ fully considered the evidence and reasonably concluded that the CT scan was the earliest definitive evidence of complicated pneumoconiosis. Therefore, Judge Buzzard would have affirmed the ALJ's commencement date for benefits.

Pulmonary Function Tests (PFTs)

MVV Results

In JB Napier v. Bic Coal Co., Inc., BRB No. 22-0225 BLA (May 12, 2023), the Board vacated the ALJ's conclusion that the Claimant did not establish total disability based on the PFT evidence. The most recent PFT of record only reported one MVV effort prebronchodilator and one MVV effort post-bronchodilator. The ALJ credited Dr. Vuskovich's opinion and found that because the PFT did not include two MVV tracings, the PFT was invalid under 20 C.F.R. § 718.103(b). Citing 20 C.F.R. § 718.101(b), the Board stated that if a PFT does not precisely conform to the requirements of 20 C.F.R. § 718.103 and Appendix B but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." The Board found that the ALJ failed to properly address whether the PFT was in substantial compliance with the quality standards. Further, the Board stated that ALJ did not explain why they gave more weight to Dr. Vuskovich's opinion regarding the Claimant's effort than to Dr. Rosenberg's opinion that the PFT was valid.

In Homer R. Preece v. Bill Mont Coal Co., Inc., BRB No. 22-0010 BLA (April 25, 2023), the Board affirmed the ALJ's decision to give more probative weight to the PFT with MVV results. The record contained a qualifying PFT taken in April 2019 and a non-qualifying PFT taken in July 2019. The April 2019 PFT contained MVV results, but the July 2019 PFT did not. The ALJ concluded that because the July 2019 PFT did not contain MVV results, it was less probative of the Claimant's respiratory condition. Because the April 2019 PFT was more "comprehensive," the ALJ gave it paramount weight and concluded that the PFT evidence established total disability. The Board found that the ALJ permissibly concluded that because the April 2019 PFT contained MVV values, it was entitled to more probative weight than the July 2019 PFT.

PFT Validity

In Charlie G. Meade v. Eastover Mining Co., BRB No. 22-0381 BLA (Nov. 20, 2023), the Board concluded that the ALJ erred in: (1) dismissing Dr. Vuskovich's opinion that the PFT evidence was invalid; (2) failing to consider Dr. Rosenberg's opinion regarding the validity of the PFT evidence; and (3) citing Revnack v. Director, OWCP, 7 BLR 1-771 (1985), for the proposition that an ALJ may give more weight to the first-hand observations of technicians who administer PFTs than to physicians who only review the tracings. The Board stated that Revnack is a case arising under 20 C.F.R. Part 727 that does not address the weight an administering technician's comments are entitled to compared to the comments of a

reviewing physician. Therefore, it vacated the ALJ's findings on the PFT evidence and remanded the case for further consideration.

Qualifying Coal Mine Employment

Substantially Similar Conditions (20 C.F.R. §718.305(b)(2))

In Anna J. Hoskins (obo George Hoskins) v. Big Elk Creek Coal Co., BRB No. 23-0056 BLA (Oct. 16, 2023), the Board affirmed the ALJ's finding that the Miner was regularly exposed to coal mine dust as a surface miner. The ALJ reviewed the Miner's Description of Coal Mine Work and Other Employment, Form CM-913, and noted the Miner last worked on the surface as a coal washer and foreman at a preparation plant, where raw coal was washed. The ALJ added that the Miner noted on their Employment History, Form CM-911a, that they were "exposed to dust, gas and fumes" during all their employment. The Board concluded that the ALJ permissibly found that the Miner's uncontradicted Employment History form was credible and established that the Miner was regularly exposed to coal mine dust as a surface miner.

In Bryan C. Snyder v. Consol Pennsylvania Coal Co., LLC, BRB No. 22-0083 BLA (June 29, 2023), the Board affirmed the ALJ's finding that the Claimant's employment as a coal transportation worker was qualifying coal mine work. Although hauling processed coal does not constitute coal mine work, the ALJ found that the Claimant hauled processed coal and raw coal on the same days. Because the regulation at 20 C.F.R. § 725.101(a)(32) defines a "working day" as "any day or part of a day for which a miner received pay for work as a miner," the Board affirmed the ALJ's finding that all the Claimant's coal transportation work was coal mine work.

In Freddie W. Smith v. DLM Coal Corp., BRB Nos. 22-0456 BLA and 22-0456 BLA-A (May 26, 2023), the Board stated that marking "yes" in response to the question on the Employment History form, Form CM-911a, regarding being exposed to dust, gases, or fumes is not, on its own, sufficient to establish that the Claimant was exposed to coal mine dust and that such exposure occurred regularly, as the regulations require.

In Homer Harrington Cole v. Consolidation Coal Co., BRB No. 21-0508 BLA (April 12, 2023), the Board affirmed the ALJ's finding that the Claimant worked in surface mine conditions that were substantially similar to underground mine conditions. At the hearing, the Claimant provided uncontradicted testimony regarding the dust conditions of their work as a driller for the Employer. The Board rejected the Employer's argument that the Claimant did not provide evidence regarding the dust conditions of their employment with prior employers. The Board noted that on Form CM-911a, the Claimant wrote that they worked as a drill operator or drill helper for four other employers, in addition to working as a driller for the Employer, and they checked a box asserting they were exposed to "dust, gases, or fumes" during all that employment. Thus, the Board concluded that the ALJ permissibly attributed the Claimant's testimony regarding the dust conditions as a driller for the Employer to their other employment as a driller.

Responsible Operator

Admission of Liability Evidence

In Harry L. McPeek v. CH Development, LLC, BRB No. 22-0490 BLA (Dec. 18, 2023), the Board affirmed the ALJ's finding that because the Employer did not designate the Claimant as a liability witness when the case was pending before the district director, which is required by 20 C.F.R. § 725.414(c), the Employer was precluded from relying on the Claimant's testimony as liability evidence. Thus, the Board concluded that the ALJ properly declined to consider the Claimant's testimony when determining whether the Employer was the responsible operator.

Length of Coal Mine Employment (RO)

In Mose Mims v. Drummond Co., Inc., BRB No. 21-0314 BLA (Feb. 24, 2023), a case arising in the Eleventh Circuit, the Board held that the ALJ erred in applying Shepherd v. Incoal, Inc., 915 F.3d 392, 401 (6th Cir. 2019), in determining whether Warrior Met, which employed the Claimant after the named responsible operator employed him, employed the Claimant for at least one year. Therefore, it vacated the ALJ's determination that the Trust Fund was liable for benefits and remanded the case for the ALJ to determine whether the Claimant was engaged in coal mine employment for one calendar year or partial periods totaling one year and, if so, whether the Claimant worked for Warrior Met for at least 125 days during that one-year period.

Statement Required by 20 C.F.R. § 725.495(d)

In Sherry Williamson (obo and survivor of Dennis D. Williamson) v. Black Rock Trucking, BRB Nos. 22-0098 BLA and 22-0099 BLA (July 26, 2023), the Board affirmed the ALJ's conclusion that Black Rock Trucking (Black Rock) was the responsible operator. The district director found that while the Claimant worked for Judith Trucking Co., Inc. (Judith Trucking) for at least one year after Black Rock, it was not financially capable of assuming liability because its carrier was insolvent. Before the ALJ, the Employer argued that the district director based their 20 C.F.R. § 725.495(d) statement on the wrong name for Judith Trucking and that the district director's investigation was incomplete. The Board found no error in the ALJ's conclusion that, based on the evidentiary record and the presumption of regularity, the district director's search for insurance coverage was sufficiently reliable. Furthermore, the Board rejected the Employer's assertion that the district director's 20 C.F.R. § 725.495(d) statement contained the wrong name. On its statement, the district director's listed "Judith Trucking Company, Inc." rather than "Judith Trucking Co." or "Judith Trucking Co., Inc." The Board found that the ALJ accurately noted that the record had five interchangeable names for Judith Trucking. Therefore, it agreed with the ALJ that because the company's "identity [was] apparent," any minor discrepancy on the district director's 20 C.F.R. § 725.495(d) statement was "not fatal."

Smoking History

In Jackie Puckett (o/b/o and survivor of Terry Puckett) v. Island Creek Pocahontas, BRB Nos. 22-0316 BLA and 22-0317 BLA (Nov. 17, 2023), the Board affirmed the ALJ's finding that the Claimant smoked cigarettes for 21.5 to forty-three pack-years. The Board stated that the ALJ considered the varied smoking histories of record and rationally found that they could not determine the exact length of the Miner's smoking history.

Status as a Miner

In Harvey D. Dobbins v. Director, OWCP, BRB No. 22-0506 BLA (Dec. 26, 2023), the Board vacated the ALJ's finding that the Claimant's work for Tuscaloosa County was not coal mine employment. The Claimant testified that they worked for Tuscaloosa County on the surface of an underground coal mine, where they worked for two to three days a week for seven hours a day and were exposed to coal and rock dust. The Claimant added that their job was part of regular mining operations. The ALJ found that the Claimant's testimony contradicted the evidence of record and was not credible. In finding that substantial evidence did not support the ALJ's finding, the Board emphasized that the Claimant identified Tuscaloosa County as coal mine employment on their claim for benefits and employment history form. Moreover, it stated that the Claimant's testimony did not contradict the description of coal mine work and other employment (Form CM-913). Therefore, it remanded the case for the ALJ to address whether the evidence shows that the Claimant's work for Tuscaloosa County constitutes coal mine employment. Moreover, in a footnote, the Board declined the Director's invitation to hold that the Claimant's work for Tuscaloosa County does not constitute coal mine employment as a matter of law.

In Larry A. Lester v. Dominion Coal Corp., BRB No. 22-0322 BLA (Nov. 7, 2023), the majority affirmed the ALJ's finding that the Claimant's work for Miners Oil Company as a tank installer, pump repairman, and supervisor, which involved traveling to mine sites four days per week and spending an average of four hours per day at the mine sites, constituted the work of a miner under the Act. The ALJ noted that the Claimant delivered oil to storage sheds at mine sites, maintained tanks and equipment, and worked at the loadout and stockpile where fuel tanks were located. The Claimant testified that after setting the tanks, they would deliver oil and tools and remain on site to check on the pumps and keep them running. The majority affirmed the ALJ's finding that delivering fuel oil to a mine site and maintaining the tanks and equipment that held the fuel was necessary to the process of extracting, preparing, or transporting coal, and, therefore, satisfied the function prong. Furthermore, because the Claimant worked at underground mine sites for a substantial portion of their employment, the majority affirmed the ALJ's finding that the Claimant's work satisfied the situs prong. Judge Boggs authored a dissenting opinion disagreeing with the majority's conclusion that the Claimant's work satisfied the situs and function prongs.

In DeWayne A. Shumate v. Maxum Petroleum Operating Co., BRB No. 22-0408 BLA (Sept. 6, 2023), the Board affirmed the ALJ's finding that the Claimant's work as a fuel pumper, which required the Claimant to refuel equipment, including loaders and bulldozers, at a surface mine met both the situs and function requirements and, therefore, constituted the work of a coal miner under the Act.

In Reba L. Smith (obo and survivor of Jerry L. White) v. Eastern Associated Coal Co., BRB Nos. 22-0269 BLA, 22-0269 BLA-A, 22-0270 BLA, and 22-0270 BLA-A (May 10, 2023), the Board reversed the ALJ's finding that the Miner's work as a security guard constituted coal mine work. The Board stated that because sitting in a guardhouse and occasionally driving around a coal mine is not integral to the extraction or preparation of coal, a security guard's work does not constitute coal mine work when they only perform those duties. However, it stated that a security guard's work can constitute coal mine work if it involves operational, safety, and repair duties, as such duties go beyond simply providing security. In this case, the Miner sat in a guardhouse and occasionally patrolled the mines. Because the evidence did not establish that the Miner's security guard work involved any operational, safety, or repair duties, the Board concluded that the Miner's work did not satisfy the function requirement as a matter of law.

In Johnny L. Ramey v. Director, OWCP, BRB No. 21-0614 BLA (Feb. 16, 2023), the Board agreed with the Director that the Claimant's work maintaining and ditching public state roads for the Virginia Department of Transportation did not constitute coal mine work under the Act. The ALJ found that because the Claimant worked within 150 feet of an actual mine site, the Claimant's work occurred "in or around" a coal mine and, therefore, met the situs prong. Additionally, the ALJ found that because coal mine operators used the roads the Claimant worked on to transport raw coal from actual mine sites to preparation plants, and the usability of the roads was integral to the preparation of coal, the Claimant's work met the function prong. The Board conceded that the Act does not specify how far "in or around" a coal mine extends, but it stated that "courts have consistently required work to be performed on the mine site, not near the mine site." It concluded, "Mere proximity is not the same as conducting work 'in or around a coal mine or coal preparation facility.'" Because the Claimant did not work on a mine property or at a tipple or extraction site, the Board reversed the ALJ's finding that the Claimant satisfied the situs prong. As to the function prong, the Board found that the ALJ erred in concluding that the Claimant's job duties were integral to the production or extraction of coal. It stated that although the Claimant's job was helpful to the coal mine operators that utilized the public roads, their duties were not vital or essential to the production or extraction of coal. Consequently, the Board reversed the ALJ's decision.

Timeliness of Claim

In Randall F. McMillin v. Consol Pennsylvania Coal Co., BRB No. 22-0148 BLA (Sept. 22, 2023), the Board agreed with the ALJ and the Director that a physician's diagnosis of totally disabling black lung, which the physician communicated to the Claimant before the district director issued a proposed decision and order denying benefits in the Claimant's prior claim, was a misdiagnosis that did not trigger the statute of limitations even though the Claimant withdrew their claim after the district director denied benefits. The Board explained that the "Claimant did not sit on their rights by withdrawing their first, denied claim and filing a later claim." Instead, based on the district director's decision that the Claimant was not entitled to benefits, the "Claimant reasonably concluded that he applied for benefits prematurely. He should not be penalized for relying on the district director's findings." Therefore, it affirmed the ALJ's finding that the Claimant's claim was timely.

Total Disability

Changed Employment Circumstances under 20 C.F.R. § 718.204(e)

In Albert C. Michalides v. Consol Pennsylvania Coal Co., BRB No. 21-0351 BLA (Jan. 6, 2023), the Board affirmed the ALJ's finding that the Claimant was totally disabled from a respiratory or pulmonary impairment even though the Claimant returned to coal mine work as a mechanic helper from February to April 2020, which was after they filed their claim for benefits. The regulation at 20 C.F.R. § 718.204(e)(2) states that "[i]n the case of a living miner, proof of current employment in a coal mine shall not be conclusive evidence that the miner is not totally disabled unless it can be shown that there are no changed circumstances of employment indicative of his or her reduced ability to perform his or her usual coal mine work." 20 C.F.R. § 718.204(e)(2). Changed circumstances of employment demonstrating a miner's reduced ability to perform their usual coal mine work include a "miner's transfer by request or assignment to less vigorous duties or to duties in a less dusty part of the mine." 20 C.F.R. § 718.204(e)(3)(iii). The Board stated the ALJ

permissibly found that because the Claimant's transfer to a less vigorous, less dusty job constituted a change in circumstances under the regulations, the Claimant's return to coal mine work as a mechanic helper was not a reason to conclude that they were not totally disabled. As the Claimant's return to work was the only reason Dr. Basheda and Dr. Rosenberg gave for concluding that they were not totally disabled, the Board found that the ALJ rationally discredited their opinions. Consequently, the Board affirmed the ALJ's determination that the medical opinion evidence did not undermine their finding that the Claimant was totally disabled based on the qualifying pulmonary function tests.

Total Disability in the Absence of Qualifying Objective Tests

In Harvey H. Johnson, Jr. v. the Monongalia County Coal Co., BRB No. 22-0517 BLA (Dec. 5, 2023), the Board affirmed the ALJ's finding that the Claimant's mild impairment rendered the Claimant totally disabled. Although the Claimant's objective tests were not qualifying, the ALJ credited Dr. Allen's medical opinion over the other medical opinions of record. Dr. Allen noted that the Claimant's usual coal mine employment required light to heavy labor and the Claimant had mild COPD with severe air trapping that increased with exertion, which rendered them unable to perform the exertional requirements of their usual coal mine employment. The Board affirmed the ALJ's decision to credit Dr. Allen's medical opinion and affirmed the ALJ's finding that the Claimant was totally disabled from a respiratory or pulmonary impairment.

Treatment Records and Lay Testimony

In Judy A. Kirkwood (survivor of Douglass R. Kirkwood) v. Island Creek Coal Co., BRB No. 22-0246 BLA (Oct. 24, 2023), the Board rejected the Employer's assertion that the ALJ erred in finding that the Miner was totally disabled. The ALJ found that the Miner's usual coal mine work as a shuttle car operator, cutting machine operator, and shooter required performing at least light exertional work on a sustained basis. Although the record did not contain qualifying ABGs or PFTs, the ALJ found that the Miner had a severe respiratory impairment that prevented them from performing the duties of their prior coal mine work. The Board explained that contrary to the Employer's contention, a physician "need not phrase their opinion specifically in terms of 'total disability' to support a finding of total disability pursuant to 20 C.F.R. 718.204(b)(2)(iv)." It added that "treatment records may support a finding of total disability if they provide sufficient information from which the ALJ can reasonably infer" that the Miner was unable to do their last coal mine job. Because the ALJ considered the relevant evidence and drew reasonable inferences from the Miner's treatment records, including noting that the Miner was treated for advanced COPD, bronchitis, and pulmonary cachexia (weight loss caused by severe COPD), used supplemental oxygen, used "a wheelchair with oxygen," and had an oxygen saturation of eighty-eight percent or lower while resting, walking, or sleeping, the Board affirmed the ALJ's conclusion that the evidence "overwhelmingly" established that the Miner was unable to perform any of their prior coal mine work or duties requiring similar exertion and was totally disabled from pulmonary standpoint at the time of their death.

In Elizabeth L. Lawson (survivor of Nathan B. Lawson) v. Lake Coal Co., Inc., BRB No. 21-0601 BLA (April 10, 2023), the Board affirmed the ALJ's finding that the Miner's treatment records, including assessments therein from three doctors regarding their oxygen dependency and symptoms of shortness of breath, respiratory distress, and hypoxia, supported finding the Miner totally disabled at the time of their death. The ALJ concluded

that the statements and objective tests in the Miner's treatment records contained sufficient information for him to reasonably infer that the Miner would have been unable to do their usual coal mine work, which required medium manual labor. Specifically, the ALJ noted that the Miner's treatment records showed the Miner's respiratory distress and hypoxia ultimately required supplemental oxygen, and the Miner was hospitalized eight times during the last year of their life for respiratory complaints. The Board stated that the ALJ rationally found that the Miner's oxygen dependency, COPD, and symptoms of shortness of breath, wheezing, and hypoxia would have prevented the Miner from doing the medium exertion required of a mine foreman. Because the ALJ fully considered and accurately characterized the relevant evidence and drew reasonable inferences from the Miner's treatment records, the Board concluded that their decision comported with the APA.

X-rays

Image Quality

In James R. Cumbow v. Frasure Creek Mining, LLC, BRB Nos. 21-0459 BLA and 21-0459 BLA-A (April 27, 2023), the Board agreed with the Claimant that the ALJ erred in giving Dr. DePonte's interpretation less weight solely because of its quality grade. Dr. DePonte interpreted an x-ray as positive for both simple and complicated pneumoconiosis, and they classified the x-ray's image quality as grade two. Because Dr. DePonte classified the x-ray's quality as grade two, the ALJ gave their interpretation less weight and found the x-ray equivocal for the presence of complicated pneumoconiosis. In concluding that image quality was not a valid reason to give Dr. DePonte's interpretation less weight, the Board emphasized that the regulations do not require x-rays to be of optimal quality; under 20 C.F.R. § 718.102(a), they only need to "be of suitable quality for proper classification of pneumoconiosis." It further noted that Dr. DePonte did not state the x-ray was unreadable. Rather, they testified they were able to interpret it for pneumoconiosis notwithstanding any quality deficiencies. Therefore, the Board vacated the ALJ's finding that the x-ray was equivocal for complicated pneumoconiosis and remanded the case for further consideration.